

1995

Consent, Credibility, and the Constitution: Evidence Relating to a Sex Offense Complainant's Past Sexual Behavior

Clifford S. Fishman

Follow this and additional works at: <https://scholarship.law.edu/lawreview>

Recommended Citation

Clifford S. Fishman, *Consent, Credibility, and the Constitution: Evidence Relating to a Sex Offense Complainant's Past Sexual Behavior*, 44 Cath. U. L. Rev. 709 (1995).

Available at: <https://scholarship.law.edu/lawreview/vol44/iss3/3>

This Article is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized editor of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.

CONSENT, CREDIBILITY, AND THE CONSTITUTION: EVIDENCE RELATING TO A SEX OFFENSE COMPLAINANT'S PAST SEXUAL BEHAVIOR

*Clifford S. Fishman**

TABLE OF CONTENTS

Introduction	711
I. Traditional Theories of Relevance; "Rape Shield"	
Legislation	713
A. Traditional Theories of Relevance	714
B. "Rape Shield" Legislation	716
1. Constitutionality	721
2. Exceptions to Exclusion	723
3. "Relevancy" and "Prejudice"	724
4. Reputation and Opinion Evidence	726
II. Admissibility of Complainant's Past Sexual Conduct to	
Rebut Physical Evidence	728
A. Source of Semen	729
B. "Injury"; Loss of Virginity; Emotional Trauma	732
1. Virginity—Adult Complainant	732
2. Virginity—Child Complainant	733

* Professor of Law, Columbus School of Law, The Catholic University of America. B.A. University of Rochester (1966); J.D. Columbia University Law School (1969). From 1969-1977 Professor Fishman served as an Assistant District Attorney in the New York County District Attorney's Office, and as Chief Investigating Assistant District Attorney to New York City's Special Narcotics Prosecutor. Since joining the faculty at the Columbus School of Law, he has consulted with the President's Commission on Organized Crime and the Justice Department on matters relating to electronic surveillance, and has occasionally taken court assignments to represent indigent defendants, in which capacity he tends to complain bitterly about prosecutors doing to him what he delighted doing to defense attorneys when the shoe was on the other foot.

Professor Fishman acknowledges with gratitude the invaluable and tireless assistance of Jeannine Rustad (J.D. CSL-CUA, 1994) in the preparation of this article, and acknowledges as well Julie Ruhling, whose ability to read his handwriting and follow the circles and arrows on various drafts of the manuscript is, frankly, astonishing.

Footnotes in this Article at times vary substantially from the dictates of A Uniform System of Citation (15th ed. 1992) at Professor Fishman's insistence.

3. Emotional Trauma	736
C. Infection	737
D. Pregnancy	738
III. Prior Consensual Sex Between Defendant and Complainant	740
A. Relevance	741
B. Factors in Assessing Admissibility	742
1. Nature of the Prior Relationship	742
2. Passage of Time	743
3. Similarity of Facts	744
4. Allegations Involving Group Sex	745
5. Evidence of Violence	748
6. Complainant's Prior, Unconsummated Sexual Interest in Defendant	748
IV. Bias; Motive to Lie	749
A. Relevance	752
1. To Deny Infidelity	752
2. To Avoid Prosecution for Prostitution	757
3. To Protect Reputation for Chastity	757
4. Vengeance or Spite	759
5. Motive Related to Drugs	764
B. Restricting Admissibility	766
V. Prior Rape Allegations Made by Complainant	768
A. Applicability of Rape Shield Legislation	769
1. Prior False Accusations	769
2. Prior True Accusations	771
B. Matters of Proof	772
1. Proving Complainant Made a Prior Accusation	772
2. Proving the Prior Accusation Was False	773
3. Extent of Admissibility	776
VI. Immediately Surrounding Circumstances	777
A. Complainant's Attire	778
B. Conduct With the Defendant	779
C. Discussion of Complainant's Prior Sexual Behavior	780
D. Conduct With Others; Public Conduct	782
VII. "Pattern," "Promiscuity," "Prostitution"	787
A. "Pattern"; Promiscuity	787
B. Evidence Relating to Prostitution	795
1. Admissibility	795
2. Means of Proof	799
VIII. Other Situations and Considerations	799

A. Evidence Elicited by Prosecutor or Volunteered by Complainant; "Opened Door" Doctrine	800
1. In General	800
2. What Constitutes "Opening the Door"	802
3. Evidence that Complainant Is or Is Not Homosexual	804
B. Miscellany	805
1. Child Abuse Cases: Admissibility on Source of Knowledge	805
2. Complainant "Confusion"	809
3. Mistake of Fact Defense: "Reasonable Belief" that Complainant Consented	810
IX. Judicial Assessment of Witness Credibility	812
A. Conditional Relevancy or Technical Admissibility	812
1. Conditional Relevancy	813
2. "Technical Issues and Policy Concerns"	814
B. Rape Shield Legislation	815
C. Case Law	817
D. Evaluation	819
Conclusion	819

INTRODUCTION

Rape is perhaps the most difficult aspect of criminal law to discuss rationally.¹ At one extreme, some scholars maintain, in self-righteous rejection of reality, that all heterosexual sex is rape.² At the other extreme, troglodytical judges still occasionally express reluctance to sentence a convicted rapist who was "led astray" by a woman who was "asking for it."³ In balancing these extremes, difficult legal questions inevitably intermix with strongly held beliefs and powerful emotions, presenting daunting challenges to reasoned discourse.⁴

1. See generally Susan Estrich, *Teaching Rape Law*, 102 YALE L.J. 509 (1992) (discussing her experiences with teaching rape law and exploring the difficult questions that arise in the context of the criminal trial).

2. See, e.g., Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 646-55 (1983) (commenting on the distinction between rape as defined by the legal system and rape as experienced by women socialized into routine compliance).

3. S. REP. NO. 197, 102d Cong., 1st Sess. 33-34 (1991) (reporting results from a state court system's study of blatant gender prejudices during rape and domestic assault proceedings in which various judicial officers ridiculed complainants). One of the most notable displays of the humiliation of a complainant occurred in a Florida state court in which a judge remarked during sentencing "that he felt sorry for a confessed rapist because his victim was such a 'pathetic' woman." *Id.* at 34.

4. See Estrich, *supra* note 1, at 515 (remarking on the need to balance in the class-

Within this controversy, a key evidentiary question arises in rape cases: to what extent, if at all, should a defendant, or a prosecutor, offer evidence of the complainant's prior sexual history.⁵ Fortunately, the days have passed when a rape accusation automatically would open the courtroom door to whatever gossip about the complainant the defendant could scrape up.⁶ Congress and forty-eight state legislatures have enacted rules to exclude such evidence unless a special showing of relevance can be made.⁷

Although there is a general consensus that the evidentiary use of prior sexual history must be restricted, legislation regulating such evidence and judicial decisions applying this legislation have taken divergent approaches as to the circumstances in which such evidence merits consideration, the degree of discretion offered to a trial judge in assessing admissibility, and how the trial judge should exercise that discretion. This uncertainty has, in turn, given rise to concern that excessive restrictions on admissibility may infringe upon a defendant's Sixth Amendment rights to present a defense and to confront and cross-examine his accusers.⁸

room the emotional "passion" which rape discussions arouse with the drive to articulate good legal arguments).

5. See *id.* at 517 (discussing this question in the context of acquaintance rape).

6. For critical examinations of attitudes and procedures predating legislative reform, see Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 12-14 (1977); Carol Bohmer, *Judicial Attitudes Toward Rape Victims*, 57 JUDICATURE 303, 304-05 (1974); Richard A. Hibey, *The Trial of a Rape Case: An Advocate's Analysis of Corroboration, Consent and Character*, 11 AM. CRIM. L. REV. 309, 325-28 (1973); Abraham P. Ordovery, *Admissibility of Patterns of Similar Sexual Conduct: The Unlamented Death of Character for Chastity*, 63 CORNELL L. REV. 90, 95-97 (1977); Camille E. LeGrand, Comment, *Rape and Rape Laws: Sexism in Society and Law*, 61 CAL. L. REV. 919, 935-36 (1973); Note, *If She Consented Once, She Consented Again—A Legal Fallacy in Forcible Rape Cases*, 10 VAL. U. L. REV. 127, 127-28 (1975); James J. Wesolowski, Note, *Indicia of Consent? A Proposal for Change to the Common Law Rule Admitting Evidence of a Rape Victim's Character for Chastity*, 7 LOY. U. CHI. L.J. 118, 119-22 (1976).

7. See *infra* note 25 (identifying the state statutes).

8. See, e.g., Barbara A. Caulfield, *The New Oregon Sexual Offenses Evidence Law: An Evaluation*, 55 OR. L. REV. 493, 499-500 (1976) (questioning whether the exclusion of such evidence violated the Sixth Amendment); Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 802 (1986) (discussing the conflict between the criticism of the common law rules and the defendant's Sixth Amendment rights); J. Alexander Tanford & Anthony J. Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544, 590 (1980) (calling for rape shield statutes to be struck down as unconstitutional and rewritten if they do not allow a defendant to defend himself properly); Barbara Child, Comment, *Ohio's New Rape Law: Does it Protect Complainant at the Expense of the Rights of the Accused?* 9 AKRON L. REV. 337, 348-49 (1975) (noting the conflict between the constitutional rights of the victim and the accused); Jerrilee Sutherland, Note, *Indiana's Rape Shield Law: Conflict with the Confrontation Clause?* 9 IND. L. REV. 418, 418-19 (1976) (relaying the purposes of the confrontation clause).

This article analyzes the theories cited by defendants, and occasionally prosecutors, to admit evidence of a rape complainant's prior sexual conduct. On the whole, courts have adequately balanced the conflicting interests presented by such evidence with concern for justice and equity. Substantial clarification, however, is required as to whether a judge is authorized, in deciding upon admissibility, to assess the credibility of the complainant, defendant, and other witnesses.

I. TRADITIONAL THEORIES OF RELEVANCE; "RAPE SHIELD" LEGISLATION

Although definitions of sexual offenses vary considerably in their details, the essence of these crimes is that (1) the defendant engaged in a statutorily designated sexual activity with the complainant⁹ (2) without her¹⁰ consent and (3) against her will.¹¹ Some rape¹² statutes also require

9. Because the word chosen to represent the person the defendant is accused of raping may effect how one's analysis of the issues is perceived, I thought it appropriate to explain my choice. Legislatures, courts, and scholars have used, among others, the words "victim," "alleged victim," "complaining witness," "complainant" and "prosecutrix." I rejected "prosecutrix" because it has an archaic, musty, sexist sound to it, and suggests that a rape case is a private cause of action brought by the woman who alleges she was raped, instead of a criminal charge brought by the public prosecutor on behalf of the state. "Alleged victim" and "complaining witness" were eliminated mainly because they are too wordy. I chose "complainant" over "victim" because the latter term implies prejudgment of what in many cases are contested issues, such as whether intercourse or other sexual acts did occur, or if they occurred without the woman's consent. "Complainant" is judgment-neutral. This is not to ignore the lamentable fact that the substantial majority of complainants are in fact victims, i.e. they have been raped or molested. I note also that the word "victim" accurately describes factual and legal reality in cases in which a defendant has been convicted and an appellate court has affirmed, and in cases in which the defendant defends only on the issue of identity while conceding that the complainant did in fact suffer the assault she describes.

10. The law in most jurisdictions is now expressed in gender-neutral terms in recognition of the fact that women occasionally commit such crimes, and men are occasionally victimized by women. The overwhelming majority of such crimes, however, are committed by men against women. To employ gender-neutral language in discussing the evidential issues that arise in rape cases would thus ignore reality and serve no useful purpose.

11. See 65 AM. JUR. 2D *Rape* § 1 (1972) (equating "against her will" as meaning "without her consent"); cf. MODEL PENAL CODE § 213.1 (Proposed Official Draft 1962) (defining rape as when "[a] male . . . has sexual intercourse with a female not his wife" where force or the threat of force is present). If the nondefendant participant was a child of less than a specified age, the conduct is criminal whether or not the child consented. See 65 AM. JUR. 2D *Rape* §§ 15-17 (1972) (describing the elements of statutory rape); cf. MODEL PENAL CODE § 213.1(d) (1962) (defining rape as intercourse with female under ten years old).

12. The terms "rape," "sexual assault," and "sexual offense" are used interchangeably in this chapter. Where the particular nature of the sexual conduct in question is relevant to the discussion, it will be specified.

the prosecutor to prove that the defendant used force.¹³

As a practical matter, a man charged with a sexual offense has four defenses available: (1) The complainant mistakenly has identified the defendant as the perpetrator; (2) No sexual activity occurred; i.e., the complainant is either lying or confused; (3) The complainant consented to the sexual activity, and currently is lying; (4) If the complainant did not consent, the defendant nevertheless reasonably believed she did. If the defendant asserts the second or third defense, a jury will want to know the complainant's motivation for falsely accusing the defendant. The failure to provide a plausible answer may weigh very heavily against him.¹⁴

A. *Traditional Theories of Relevance*

Until recently, a defendant who asserted any of the latter three defenses routinely would offer evidence, assuming such evidence existed or could be manufactured,¹⁵ of the complainant's prior nonmarital or extramarital sexual activity. A defendant might elicit such information by cross-examining the complainant about her prior sexual activity, by calling one or more men to testify about their prior sexual relations with her, or by calling witnesses to testify about the complainant's reputation of unchastity or promiscuity.¹⁶ Even if such evidence had no direct rele-

13. See, e.g., MD. ANN. CODE art. 27, § 462 (1992). There is now widespread acceptance of the principle that "no means no," i.e., that it constitutes rape if a defendant persists to intercourse after the complainant has clearly said no. See *State ex rel. M.T.S.*, 609 A.2d 1266, 1279 (N.J. 1992) (finding that no physical force was necessary beyond sexual penetration where the complainant did not consent). However, evidence of force, beyond that necessary to perform the act of intercourse itself, is still required in many states. See *Commonwealth v. Berkowitz*, 641 A.2d 1161, 1164-65 (Pa. 1994) (reversing a rape conviction, although the complainant said "no" throughout the encounter, because the defendant had not used force); see also Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1125-28 (1986) (advocating reform to reflect that the lack of verbal consent translates into rape).

14. In a related context, recall Supreme Court Justice Clarence Thomas's inability, during Senate Judiciary Committee confirmation hearings, to suggest a reason why Professor Anita Hill would falsely accuse him of sexual harassment.

15. At least according to popular wisdom, perjury by defense witnesses was distressingly common in such cases.

16. Most jurisdictions admitted reputation testimony. See Kristine Cordier Karnezis, Annotation, *Modern Status of Admissibility, in Forcible Rape Prosecution, of Complainant's General Reputation for Unchastity*, 95 A.L.R.3d 1181, 1185 (1979) (maintaining that cases generally allow evidence of a complainant's reputation for unchastity on the issue of consent). As originally enacted, the Federal Rules of Evidence (hereinafter FRE) did likewise. FRE 404(a)(2) permits a defendant to offer reputation or opinion evidence of a "pertinent trait of character of the victim of the crime . . ." FED. R. EVID. 404(a)(2). The Advisory Committee Note commented, "an accused may introduce pertinent evidence of the character of the victim, as in support of a claim of . . . consent in a case of rape . . ." FED. R. EVID. 404 Advisory Committee's Note.

Some jurisdictions also admitted evidence of specific acts. See, e.g., *Fuller v. State*, 313

vance to the specific facts of the case, it was considered relevant for the following reasons:

1. *Credibility.* It was considered "a matter of common knowledge that the bad character of a man for chastity does not even in the remotest degree affect his character for truth . . . while it does that of a woman."¹⁷ In other words, evidence that a woman was unchaste was thought relevant to prove that she was also a liar.¹⁸

2. *Consent; the "yes/yes inference."* Evidence that the complainant engaged in nonmarital sex was considered relevant to support a defendant's claim that she consented to have sex with him on the occasion in question because "common experience teaches us that the woman who has once departed from the paths of virtue is far more apt to consent to another lapse than is the one who has never stepped aside from that path."¹⁹ In essence, the evidence that the complainant consented to have sex with some men²⁰ on some occasions makes it more probable that she would consent to have sex with any man at any time. This is referred to hereinafter as the "yes/yes inference,"²¹ i.e., the inference that "yes to some men sometimes means yes to any man any time."

3. *Defendant's reasonable belief that complainant consented.* Even if

S.E.2d 505, 506 (Ga. Ct. App. 1984); *Hamilton v. State*, 365 S.E.2d 120, 123 (Ga. Ct. App. 1987); *Critchlow v. State*, 346 N.E.2d 591, 599 (Ind. 1976); *Shay v. State*, 90 So.2d 209, 211 (Miss. 1956) (superseded by Miss. R. EVID. 412); *State v. Heisinger*, 252 N.W.2d 899, 905 (S.D. 1977) (construing a rape shield statute which declared that evidence of the victim's sexual conduct with persons other than the accused would be inadmissible unless relevant to a fact at issue, as permitting such evidence on the issue of consent). See generally Kristine Cordier Karnezis, Annotation, *Modern Status of Admissibility, in Forcible Rape Prosecution, of Complainant's Prior Sexual Acts*, 94 A.L.R.3d 257, 265 (1979).

17. *State v. Sibley*, 33 S.W. 167, 171 (Mo. 1895).

18. 3A JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 924a (Chadbourn rev. ed. 1970). Consider the following passage:

[Rape complainants'] psychic complexes are multifarious, distorted partly by inherent defects, partly by diseased derangements or abnormal instincts, partly by bad social environment, partly by temporary physiological or emotional conditions The unchaste . . . mentality finds incidental but direct expression in the narration of imaginary sex incidents of which the narrator is the heroine or the victim.

Id.

19. *State v. Wood*, 122 P.2d 416, 418 (Ariz. 1942). This belief has been previously articulated. One court noted that "it is certainly more probable that a woman who has done these things voluntarily in the past would be much more likely to consent than one whose past reputation was without blemish, and whose personal conduct could not truthfully be assailed." *People v. Johnson*, 39 P. 622, 623 (Cal. 1895).

20. Other than her husband, if she is married.

21. See generally Frank Tuerkheimer, *A Reassessment and Redefinition of Rape Shield Laws*, 50 OHIO ST. L.J. 1245, 1266 (1989) (discussing this inference in the context of whether the accused's knowledge of prior sexual activity should have a bearing on admissibility).

the complainant did not in fact consent to intercourse, information concerning the complainant's prior sexual activity, *if known to the defendant* prior to the events giving rise to the rape accusation, was considered relevant on the question whether the defendant reasonably believed that she consented.

B. "Rape Shield" Legislation

In the past three decades, this evidentiary use of the complainant's prior sexual behavior has been harshly criticized in four basic ways. First, the attitudes underlying the "credibility" and "consent" theories of relevance, previously accepted as "common knowledge," became recognized as factually questionable and, eventually, politically unacceptable.²² Second, indulgence in such beliefs had an unacceptable cost: a rape defendant could subject the complainant to public embarrassment and humiliation by eliciting evidence concerning her prior sexual conduct. This not only compounded the trauma of the rape, but also discouraged many victims from coming forward in the first place.²³ Third, such evidence injected collateral matters which prolonged the trial and distracted the jury from the facts at issue. Fourth, admission of such evidence too often resulted in acquittals of men who should have been convicted.²⁴

The federal government and most states responded to the criticisms

22. See, e.g., *People v. Sandoval*, 552 N.E.2d 726, 730 (Ill.), *cert. denied*, 498 U.S. 938 (1990); *State ex rel Pope v. Superior Court*, 545 P.2d 946, 950-53 (Ariz. 1976).

Contemporary attitudes and knowledge have led to other changes in the law of rape. For example, the "marital exemption" holds that "the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband." 1 MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 628 (W.A. Stokes & E. Ingersoll eds., 1847). This has been revoked by court decision or legislation in several states. Similarly, until fairly recently, many states required substantial corroboration, not permitting a rape conviction based solely on the testimony of the complainant. See Vitauts M. Gulbis, Annotation, *Modern Status of Rule Regarding Necessity for Corroboration of Victim's Testimony in Prosecution for Sexual Offense*, 31 A.L.R.4TH 120, 124 (1984). Many jurisdictions required a judge to instruct the jury to be skeptical of the complainant's testimony because rape is an easy charge to bring and a difficult charge to defend against. See Kristine Cordier Karnezis, Annotation, *Propriety of, or Prejudicial Effect of Omitting or of Giving, Instruction to the Jury, in Prosecution for Rape or Sexual Offense, as to Ease of Making or Difficulty of Defending Against Such a Charge*, 92 A.L.R.3D 866, 868 (1979).

23. See *State v. Williams*, 580 P.2d 1341, 1343 (Kan. 1978) (remarking that the aim of Kansas' rape shield statute was to stop the complainant from being placed on trial herself); see also *Commonwealth v. Fitzgerald*, 590 N.E.2d 1151, 1155 (Mass. 1992) (quoting *Williams*).

24. See Tuerkheimer, *supra* note 21, at 1250-51 (discussing the need to keep the jury focused on the pertinent issues and the need to minimize the complainant's fears that the trial will produce negative results).

and enacted "rape shield laws"²⁵ to restrict the use of evidence of a com-

25. The phrase "rape shield law" reflects the fact that such legislation helps shield the complainant from the embarrassment of having her prior sexual behavior revealed (or lied about) during the trial. The 48 state statutes are as follows:

- Alabama: ALA. CODE § 12-21-203 (Supp. 1985).
 Alaska: ALASKA STAT. § 12.45.045 (Supp. 1990).
 Arkansas: ARK. CODE ANN. § 16-42-101 (Michie 1994).
 California: CAL. EVID. CODE §§ 782, 1103(b) (West Supp. 1995).
 Colorado: COLO. REV. STAT. § 18-3-407 (Supp. 1994).
 Connecticut: CONN. GEN. STAT. ANN. § 54-86f (West 1994).
 Delaware: DEL. CODE ANN. tit. 11, §§ 3508-3509 (Supp. 1994).
 Florida: FLA. STAT. ANN. § 794.022(2)-(3) (West 1992).
 Georgia: GA. CODE ANN. § 24-2-3 (Supp. 1995).
 Hawaii: HAW. R. EVID. 412.
 Idaho: IDAHO R. EVID. 412.
 Illinois: ILL. ANN. STAT. ch. 725, para. 115-7 (Smith-Hurd Supp. 1994).
 Indiana: IND. CODE ANN. § 35-37-4-4 (Burns 1994).
 Iowa: IOWA R. EVID. 412.
 Kansas: KAN. STAT. ANN. § 21-3525 (Supp. 1993).
 Kentucky: KY. REV. STAT. ANN. § 510.145 (Michie/Bobbs-Merrill 1990).
 Louisiana: LA. CODE EVID. ANN. art. 412 (West 1995).
 Maine: ME. R. EVID. 412.
 Maryland: MD. ANN. CODE art. 27, § 461A (1992).
 Massachusetts: MASS. GEN. LAWS ANN. ch. 233, § 21B (West 1986).
 Michigan: MICH. COMP. LAWS ANN. § 750.520j (West 1991).
 Minnesota: MINN. R. EVID. 412.
 Mississippi: MISS. CODE ANN. §§ 97-3-68, 97-3-70 (1994).
 Missouri: MO. ANN. STAT. § 491.015 (Vernon 1994).
 Montana: MONT. CODE ANN. § 45-5-511(2) (1993).
 Nebraska: NEB. REV. STAT. § 28-321 (Supp. 1989).
 Nevada: NEV. REV. STAT. ANN. §§ 48.069, 50.090 (Michie Supp. 1993).
 New Hampshire: N.H. REV. STAT. ANN. § 632-A:6 (Supp. 1994).
 New Jersey: N.J. STAT. ANN. § 2A:84A-32.1-.3 (West 1994).
 New Mexico: N.M. R. EVID. 11-413.
 New York: N.Y. CRIM. PROC. LAW § 60.42 (McKinney 1992).
 North Carolina: N.C. R. EVID. 412.
 North Dakota: N.D. CENT. CODE § 12.1-20-14 to -15 (1985).
 Ohio: OHIO REV. CODE ANN. § 2907.02(D) (Anderson 1993).
 Oklahoma: OKLA. STAT. ANN. tit. 12, § 2412 (West Supp. 1993).
 Oregon: OR. R. EVID. 412; OR. REV. STAT. § 40.210 (1993).
 Pennsylvania: 18 PA. CONS. STAT. ANN. § 3104 (1992).
 Rhode Island: R.I. GEN. LAWS § 11-37-13 (1994).
 South Carolina: S.C. CODE ANN. § 16-3-659.1 (Law. Co-op. 1985).
 South Dakota: S.D. CODIFIED LAWS ANN. § 23A-22-15 (1988).
 Tennessee: TENN. R. EVID. 412.
 Texas: TEX. R. EVID. 412.
 Vermont: VT. STAT. ANN. tit. 13, § 3255 (Supp. 1994).
 Virginia: VA. CODE ANN. § 18.2-67.7 (Michie 1988).
 Washington: WASH. REV. CODE ANN. § 9A.44.020 (West 1988).
 West Virginia: W. VA. CODE § 61-8B-11 (1992).
 Wisconsin: WIS. STAT. ANN. § 972.11(2)(b) (West 1985).
 Wyoming: WYO. STAT. § 6-2-312 (1988).

See JOSEPH & SALTZBURG, EVIDENCE IN AMERICA: THE FEDERAL RULES IN THE

plainant's prior sexual conduct²⁶ in prosecutions for sex offenses and related crimes.²⁷ As a result, the general principle excluding evidence of the complainant's prior sexual conduct if its only theory of relevance is the "yes/yes inference" has won near-universal acceptance. Many rape shield statutes also require a defendant to provide advance written notice of the intent to use such evidence and provide for an *in camera* pretrial hearing to determine its admissibility. Rule 412 of the Federal Rules of Evidence (hereinafter "FRE 412") is typical of such statutes:

Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition

(a) **EVIDENCE GENERALLY INADMISSIBLE.**—The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

- (1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.
- (2) Evidence offered to prove any alleged victim's sexual

STATES (1987 & Supp. 1992) (listing some statutes); Kim Steinmetz, Note, *State v. Oliver: Children with a Past; The Admissibility of the Victim's Prior Sexual Experience in Child Molestation Cases*, 31 ARIZ. L. REV. 677, 680 n.18 (1989) (presenting a list of other state statutes).

The highest courts of the two remaining states, Arizona and Utah, have recognized the principles underlying rape shield legislation. *Pope*, 545 P.2d at 950; *State v. Johns*, 615 P.2d 1260, 1263-64 (Utah 1980) (holding that absent circumstances enhancing its probative value, evidence of a rape victim's general reputation for sexual promiscuity and specific prior unchaste acts is generally irrelevant and inadmissible).

26. Rape shield legislation regulates evidence of the complainant's sexual conduct *after* the alleged rape as well as such conduct before the alleged rape. Several state statutes explicitly so provide. See, e.g., N.J. STAT. ANN. § 2C:14-7c (West 1994) (specifying post-event as well as pre-event conduct); IDAHO R. EVID. 412(d); IOWA R. EVID. 412(d); LA. CODE EVID. ANN. art. 412(F) (West 1995); MISS. R. EVID. 412(d); N.C. R. EVID. 412(a). For court decisions to the same effect, see *Evans v. State*, 878 S.W.2d 750, 754 (Ark. 1994); *Kemp v. State*, 606 S.W.2d 573, 575 (Ark. 1980); *State v. Wattenbarger*, 776 P.2d 1292, 1294 (Or. Ct. App. 1989); *State v. Gulrud*, 412 N.W.2d 139, 142 (Wis. Ct. App. 1987).

Logic dictates a similar rule even in the absence of a specific provision to this effect. Barring unusual circumstances, the complainant's conduct *subsequent* to the alleged rape or assault will be even less relevant than was her conduct before it.

The related issue of whether specific behavior constitutes a part of the sequence of events that resulted in the alleged rape is discussed *infra* part VI.

27. See, e.g., *United States v. Duncan*, 855 F.2d 1528, 1533-35 (11th Cir. 1988), *cert. denied*, 489 U.S. 1029 (1989) (applying FRE 412 to a kidnapping prosecution in which the defendant allegedly raped the complainant); *State v. Friend*, 493 N.W.2d 540, 545 (Minn. 1992) (applying the state rape shield statute in a prosecution for murder and felony-murder committed in connection with rape); FED. R. EVID. 412 Advisory Committee's Note (noting that "[t]he reason for extending the rule to all criminal cases is obvious"). But see *State v. Sexton*, 444 S.E.2d 879, 900 (N.C.), *cert. denied*, 115 S. Ct. 525 (1994) (allowing the state to offer evidence of a rape-and-murder victim's fidelity to her husband); see also discussion *infra* part VIII. A.

predisposition.

(b) EXCEPTIONS.—

- (1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:
 - (A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence;
 - (B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and
 - (C) evidence the exclusion of which would violate the constitutional rights of the defendant.
- (2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.

(c) PROCEDURE TO DETERMINE ADMISSIBILITY.—

- (1) A party intending to offer evidence under subdivision (b) must—
 - (A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and
 - (B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.
- (2) Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.²⁸

28. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 40141(b), 108 Stat. 1918, 1919 (1994). The current version, as amended in 1994, is considerably shorter than its predecessor. As enacted in 1978, the rule read:

Rule 412. Rape Cases; Relevance of Victim's Past Behavior

(a) Notwithstanding any other provision of law, in a criminal case in which a person is accused of rape or of assault with intent to commit rape, reputation

or opinion evidence of the past sexual behavior of an alleged victim of such rape or assault is not admissible.

- (b) Notwithstanding any other provision of law, in a criminal case in which a person is accused of rape or of assault with intent to commit rape, evidence of a victim's past sexual behavior other than reputation or opinion evidence is also not admissible, unless such evidence other than reputation or opinion evidence is—
- (1) admitted in accordance with subdivisions (c)(1) and (c)(2) and is constitutionally required to be admitted; or
 - (2) admitted in accordance with subdivision (c) and is evidence of—
 - (A) past sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or injury; or
 - (B) past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which rape or assault is alleged.
- (c) [Procedure: notice and in camera hearing.]
- (1) If the person accused of committing rape or assault with intent to commit rape intends to offer under subdivision (b) evidence of specific instances of the alleged victim's past sexual behavior, the accused shall make a written motion to offer such evidence not later than fifteen days before the date on which the trial in which such evidence is to be offered is scheduled to begin, except that the court may allow the motion to be made at a later date, including during trial, if the court determines either that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which such evidence relates has newly arisen in the case. Any motion made under this paragraph shall be served on all other parties and on the alleged victim.
 - (2) The motion described in paragraph (1) shall be accompanied by a written offer of proof. If the court determines that the offer of proof contains evidence described in subdivision (b), the court shall order a hearing in chambers to determine if such evidence is admissible. At such hearing the parties may call witnesses, including the alleged victim, and offer relevant evidence. Notwithstanding subdivision (b) of rule 104, if the relevancy of the evidence which the accused seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the hearing in chambers or at a subsequent hearing in chambers scheduled for such purpose, shall accept evidence on the issue of whether such condition of fact is fulfilled and shall determine such issue.
 - (3) If the court determines on the basis of the hearing described in paragraph (2) that the evidence which the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in the trial to the extent an order made by the court specifies evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined.
- (d) For purposes of this rule, the term "past sexual behavior" means sexual behavior other than the sexual behavior with respect to which rape or assault with intent to commit rape is alleged.

Privacy Protection for Rape Victims Act of 1978, Pub. L. No. 95-540, § 2(a), 92 Stat. 2046, 2046-47 (1978), *as amended by* Act of Nov. 18, 1988, Pub. L. No. 100-690, § 7046(a), 102 Stat. 4395, 4400 (1988). The amendment substituted "Sex Offense" for "Rape" in the heading and substituted "an offense under chapter 109A of title 18, United States Code" and "offense" for "rape or of assault with intent to commit rape" and "rape or assault,"

FRE 412 is intended to be extremely broad in scope.²⁹ The exclusion of the complainant's prior sexual behavior encompasses evidence suggesting her alleged sexual predisposition³⁰ and indirect evidence of sexual behavior including evidence of the use of contraceptives,³¹ the birth of an illegitimate child,³² venereal disease,³³ and "activities of the mind, such as fantasies or dreams."³⁴ It also is intended to exclude evidence which, although not referring directly to sexual activities or thoughts, may have a sexual connotation for the factfinder "such as that relating to the alleged victim's mode of dress, speech, or life-style"³⁵

1. Constitutionality

Because rape shield laws exclude evidence traditionally considered relevant to the defense of a sex crime prosecution, they implicate the Sixth Amendment rights to confront and cross-examine one's accusers and to present a defense. These rights, however, are not absolute. In *Michigan v. Lucas*,³⁶ the Supreme Court observed that "[t]he right to present relevant testimony is not without limitation. The right 'may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial

respectively. Minor and Technical Criminal Law Amendments Act of 1988, Pub. L. No. 100-690, § 7046(a), 102 Stat. 4395, 4400 (1988). Many state statutes are modelled to some extent on the original version of FRE 412. See *supra* notes 25-26.

The 1994 version of FRE 412 differs from its predecessor primarily in style. The 1994 version contains a provision, absent in the 1978 version, regulating use of such evidence in civil litigation. Moreover, the provisions differ somewhat in how the judge is to balance the legitimate probative value of the evidence against the grounds for exclusion. See *infra* notes 47-57 (addressing the issue of how the judge balances the probative value against exclusion).

29. See generally FED. R. EVID. 412 Advisory Committee's Note (1994) (describing the scope of the Rule).

30. *Id.* (explaining that Rule 412 intends to remove any sexual connotations that the information may convey to the fact finder).

31. *Id.* (citing *United States v. Galloway*, 937 F.2d 542 (10th Cir. 1991), *cert. denied*, 113 S. Ct. 418 (1992)).

32. *Id.* (citing *United States v. One Feather*, 702 F.2d 736 (8th Cir. 1983)).

33. *Id.* (citing *Kansas v. Carmichael*, 727 P.2d 918, 925 (Kan. 1986)); cf. *infra* part II.C.

34. *Id.* (citing 23 CHARLES A. WRIGHT & KENNETH A. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE* § 5384 at 548 (1980)). Wright and Graham observe that "[w]hile there may be some doubt under statutes that . . . [speak of past sexual] 'conduct,' it would seem that the language of [FRE] 412 is broad enough to encompass the behavior of the mind." *Id.*

35. FED. R. EVID. 412 Advisory Committee's Note.

36. 500 U.S. 145 (1991). In *Lucas*, the trial court precluded the defendant from presenting evidence of his prior sexual relationship with the complainant because the defendant failed to comply with a statute requiring him to give pretrial notice of his intent to offer such evidence. *Id.* at 146. The Supreme Court held that this was not a per se violation of the Sixth Amendment. *Id.* at 152-53.

process.' ”³⁷ Thus, “ ‘trial judges retain wide latitude’ to limit reasonably a criminal defendant’s right to cross-examine a witness ‘based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness’ safety, or interrogation that is repetitive or only marginally relevant.’ ”³⁸

Several of the concerns mentioned by the Court underlie rape shield statutes. Such legislation represents a legislative judgment that evidence of a complainant’s prior sexual conduct is “only marginally relevant”³⁹ and that, barring unusual circumstances, it tends to confuse the issues, unduly harass witnesses, and may also be unfairly prejudicial to the prosecution.⁴⁰ Accordingly, courts have upheld the general constitutionality of rape shield statutes⁴¹ challenged for violating due process or equal protection,⁴² for denying a defendant the right to confront and cross-examine accusers,⁴³ for violating a defendant’s privilege against self-

37. *Id.* at 149 (quoting *Rock v. Arkansas*, 483 U.S. 44, 55 (1987)).

38. *Id.* (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)).

39. It is often argued that evidence of a complainant’s prior sexual behavior is generally “irrelevant” on the question whether she consented on the occasion in question. This overstates the case somewhat. Common sense suggests that a woman who regards going to bed with a man as a pleasant way to end a pleasant evening, and has done so with a substantial number of men over the last few years, is more likely to have consented on a particular occasion than is, for example, a woman who believes that sex outside of marriage is immoral and sinful and has never engaged in it. Evidence of the first woman’s prior sexual conduct should be excluded, not because it is “irrelevant,” but because, in the absence of special circumstances, it is not relevant enough to overcome the reasons justifying exclusion.

40. See *infra* notes 47-57 and accompanying text (discussing relevance and prejudice).

41. Joel E. Smith, Annotation, *Constitutionality of “Rape Shield” Statute Restricting Use of Evidence of Victim’s Sexual Experiences*, 1 A.L.R.4TH 283, 285-300 (1980).

42. Ala—*Darrow v. State*, 451 So. 2d 394, 397 (Ala. Crim. App. 1984).

Ark—*Kemp v. State*, 606 S.W.2d 573, 575 (Ark. 1980).

Cal—*People v. Blackburn*, 128 Cal. Rptr. 864, 866-67 (Cal. Ct. App. 1976).

Ill—*People v. Bachman*, 414 N.E.2d 1369, 1374 (Ill. App. Ct. 1981).

Ind—*Shaffer v. State*, 443 N.E.2d 838, 839 (Ind. 1983).

Kan—*State v. Williams*, 580 P.2d 1341, 1343 (Kan. 1978).

Ohio—*State v. Gardner*, 391 N.E.2d 337, 340-41 (Ohio 1979).

Md—*White v. State*, 598 A.2d 187, 194 (Md. 1991).

Mo—*State v. Madsen*, 772 S.W.2d 656, 658-59 (Mo. 1989), *cert. denied*, 493 U.S. 1096 (1990).

SC—*State v. McCoy*, 261 S.E.2d 159, 161 (S.C. 1979).

Wash—*State v. Blum*, 561 P.2d 226, 229 (Wash. 1977).

43. Ala—*Fairchild v. State*, 505 So. 2d 1265, 1269-70 (Ala. Crim. App. 1986).

Alaska—*Kvasnikoff v. State*, 674 P.2d 302, 306 (Alaska Ct. App. 1983) (homosexual rape).

Ark—*Marion v. State*, 590 S.W.2d 288, 289 (Ark. 1979).

Colo—*People v. McKenna*, 585 P.2d 275, 279 (Colo. 1978).

Conn—*State v. Preyer*, 502 A.2d 858, 864 (Conn. 1985).

Ga—*Lassiter v. State*, 333 S.E.2d 412, 416 (Ga. Ct. App. 1985).

Ill—*People v. Requena*, 435 N.E.2d 125, 128 (Ill. App. Ct. 1982), *cert. denied*, 459

incrimination,⁴⁴ for vagueness,⁴⁵ or a variety of other grounds.⁴⁶

2. *Exceptions to Exclusion*

Nevertheless, situations occur in which evidence of the complainant's prior sexual conduct is highly relevant to impeach the complainant, rebut an element of the government's case or support an affirmative defense. In these situations, exclusion of such evidence would deprive the defend-

U.S. 1204 (1983).

Ind—*Roberts v. State*, 373 N.E.2d 1103, 1106-07 (Ind. 1978); *Stephens v. Morris*, 756 F. Supp. 1137, 1143 (N.D. Ind. 1991).

Kan—*State v. Blue*, 592 P.2d 897, 900-01 (Kan. 1979).

Ky—*Smith v. Commonwealth*, 566 S.W.2d 181, 183 (Ky. Ct. App. 1978).

Md—*White v. State*, 598 A.2d 187, 194 (Md. 1991).

Mich—*People v. Arenda*, 330 N.W.2d 814, 816-17 (Mich. 1982); *People v. Williams*, 330 N.W.2d 823, 827 (Mich. 1982).

Miss—*Johnston v. State*, 376 So. 2d 1343, 1346-47 (Miss. 1979).

Mo—*State v. Brown*, 636 S.W.2d 929, 934 (Mo. 1982), *cert. denied*, 459 U.S. 1212 (1983).

Neb—*Pratt v. Parratt*, 615 F.2d 486, 487 (8th Cir.), *cert. denied*, 449 U.S. 852 (1980).

NJ—*State v. Budis*, 593 A.2d 784, 791 (N.J. 1991).

NM—*State v. Herrera*, 582 P.2d 384 (N.M. Ct. App.), *cert. denied*, 580 P.2d 972 (N.M. 1978).

NY—*People v. Mandel*, 403 N.Y.S.2d 63, 66 (N.Y. App. Div. 1978), *rev'd*, 401 N.E.2d 185 (N.Y. 1979), *cert. denied*, 446 U.S. 949 (1980); *People v. Conyers*, 382 N.Y.S.2d 437, 444 (N.Y. Crim. Ct. 1976).

ND—*State v. Piper*, 261 N.W.2d 650, 655 (N.D. 1977).

OK—*Cameron v. State*, 561 P.2d 118, 122 (Okla. Crim. App. 1977).

Or—*State v. Barrington*, 570 P.2d 394, 395 (Or. Ct. App. 1977).

Pa—*Commonwealth v. Quartman*, 458 A.2d 994, 998 (Pa. Super. Ct. 1983);

Commonwealth v. Dear, 492 A.2d 714, 720 n.2 (Pa. Super. Ct. 1985).

SC—*State v. McCoy*, 261 S.E.2d 159, 161 (S.C. 1979).

Tex—*Allen v. State*, 700 S.W.2d 924, 932 (Tex. Crim. App. 1985); *Garza Barreda v. State*, 739 S.W.2d 368, 370 (Tex. Ct. App.), *rev'd on recons.*, 760 S.W.2d 1 (Tex. Ct. App. 1987).

Wash—*State v. Hudlow*, 659 P.2d 514, 518 (Wash. 1983).

W Va—*State v. Persinger*, 286 S.E.2d 261, 265 (W. Va. 1982).

But see State v. Herndon, 426 N.W.2d 347, 348 (Wis. Ct. App. 1988) (noting that a statutory provision which absolutely prohibited evidence of complainant's prior sexual conduct, even if it was probative of her bias or prejudice or showed a continuing pattern of conduct, violated a defendant's Sixth Amendment right to confront adverse witnesses and to present witnesses in his own behalf).

44. *Marion*, 590 S.W.2d at 290; *Blackburn*, 128 Cal. Rptr. at 868; *Smith v. Commonwealth*, 566 S.W.2d 181, 183 (Ky. Ct. App. 1978); *Holloway v. State*, 695 S.W.2d 112, 119 (Tex. Ct. App. 1985).

45. *Young v. State*, 429 So. 2d 1162, 1163 (Ala. Crim. App. 1983); *Blackburn*, 128 Cal. Rptr. at 867; *State v. Carmichael*, 727 P.2d 918, 925 (Kan. 1986); *Madsen*, 772 S.W.2d at 659.

46. *McKenna*, 585 P.2d at 279 (separation of powers); *Roberts*, 373 N.E.2d at 1107 (separation of powers); *Finney v. State*, 385 N.E.2d 477, 480 (Ind. Ct. App. 1979) (effective assistance of counsel); *Herrera*, 582 P.2d at 389 (separation of powers).

ant of the right to present a defense or to confront his accuser. The challenge presented is to permit a defendant to offer such evidence in appropriate cases, without allowing the exceptions to, in effect, swallow the rule, thereby returning the law to *status quo ante*.

Exceptions to the general rule of exclusion fall into a variety of categories, as indicated in parts II-VIII of the outline at the beginning of this article. Each category is mentioned in some rape shield statutes; no category is mentioned in all. Each exception, however, raises constitutional questions that a court must address in determining admissibility.

3. "Relevancy" and "Prejudice"

After a court determines that evidence of the complainant's prior sexual behavior has sufficient special relevance to merit consideration, the court must assess that relevance against the risk of unfair prejudice, embarrassment, humiliation, and other similar factors. General evidence principles dictate that if evidence is relevant on a contested issue, courts should admit it unless "the danger of unfair prejudice, confusion of the issues, or misleading the jury" substantially outweighs its legitimate probative value.⁴⁷ A number of rape shield statutes explicitly incorporate such language;⁴⁸ others contain no special language but effectively retain the same meaning.⁴⁹ Some statutes alter the traditional balancing test, authorizing admission only if the "probative value of such evidence outweighs the danger of unfair prejudice"⁵⁰ Other statutes utilize different formulations.⁵¹

47. FED. R. EVID. 403. This rule provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.* For a detailed discussion of how the balance between probative value and its counterconsiderations should be struck, see 2 C. FISHMAN, JONES ON EVIDENCE §§ 11:9-18 (7th ed. 1994).

48. See, e.g., MINN. R. EVID. 412(2)(C).

49. FED. R. EVID. 412(b)(1); see, e.g., ME. R. EVID. 412; R.I. R. EVID. 412; TEX. R. EVID. 412(c).

50. State provisions containing this language include: IDAHO R. EVID. 412(c)(3); IOWA R. EVID. 412(c)(3); LA. CODE EVID. ANN. art. 412E(3) (West 1995); MISS. R. EVID. 412(c)(3); OR. R. EVID. 412(c). As enacted in 1978, FRE 412(c)(3) contained this language. The 1994 version of FRE 412(b)(2) provides that such evidence is admissible in a civil case "if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party." FED. R. EVID. 412(b)(2).

51. For example, the Delaware Code authorizes the judge to admit such evidence if it is relevant to "attack the credibility of the complaining witness." DEL. CODE ANN. tit. 11, § 3508 (Supp. 1994).

New Mexico requires exclusion "unless, and only to the extent that the court finds, that [the proffered reputation, opinion, or specific act] evidence of the victim's past sexual con-

The application of the term "relevant" or "probative value" in this context needs no detailed explanation. Simply, a court should require a defendant to specify the issue or issues the evidence is intended to address and demonstrate how the evidence is truly probative on those issues exclusive of the forbidden "yes/yes inference."

Application of the term "prejudice," however, causes some confusion in this context. Scholarly commentary, court decisions, and even at least one statute speak of the "unfair prejudice [of such evidence] to the victim"⁵² Traditionally, of course, the concept of "prejudice" applied solely to *parties*, not to a witness, regardless of how closely identified with a particular party the witness may be, as the complainant is to the prosecutor in sex offense cases. General evidentiary principles require a judge to protect a witness against "harassment or undue embarrassment."⁵³ Most rape shield statutes enhance those protections with numerous additional protections, both procedural and substantive.⁵⁴ The assessment of "unfair prejudice" should therefore focus on the impact of the evidence on the state, not the complainant. The Supreme Court of Washington, in *State v. Hudlow*,⁵⁵ stated this concept succinctly:

The issue is not whether evidence is prejudicial in the sense that it is detrimental to someone involved in the trial. *Rather, the question is whether the evidence will arouse the jury's emotions of prejudice, hostility, or sympathy. Arguments that sexual history evidence is inadmissible because of its prejudicial impact on the rape victim miss the point. Adverse psychological effects suffered by crime victims, although regrettable, are not grounds for excluding probative evidence.*⁵⁶

duct is material and relevant to the case and that its inflammatory or prejudicial nature does not outweigh its probative value." N.M. R. EVID. 413(A). The New Mexico rule does not limit theories of relevance to any particular category.

N.C. R. EVID. 412 excludes reputation and opinion evidence, specifies the permissible theories of relevance of specific act evidence, and directs the court to admit such evidence providing it is "relevant." N.C. R. EVID. 412(b)-(d).

The Washington statute authorizes admission to the extent that the judge finds the evidence "is relevant to the issue of the victim's consent; is not inadmissible because its probative value is substantially outweighed by the probability that its admission will create a substantial danger of undue prejudice; and that its exclusion would result in denial of substantial justice to the defendant" WASH. REV. CODE ANN. § 9A.44.020 (West 1988).

52. TENN. R. EVID. 412(d)(4) (emphasis added).

53. FED. R. EVID. 611(a). The rule states: "The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to . . . (3) protect witnesses from harassment or undue embarrassment." *Id.*

54. See *supra* notes 47-51 and accompanying text.

55. 659 P.2d 514 (Wash. 1983). See *infra* notes 336-48 and accompanying text (discussing *State v. Hudlow*).

56. *Id.* at 521 (quoting and adding emphasis to *State v. Hudlow*, 635 P.2d 1096, 1100

Thus, after assessing the legitimate probative value of the evidence, the court should "consider the effect of excluding such evidence on defendant's right to a fair trial" and balance that effect against the "potential prejudice to the truthfinding process itself . . . to determine whether the introduction of the victim's past sexual conduct may confuse the issues, mislead the jury, or cause the jury to decide the case on an improper or emotional basis."⁵⁷

4. *Reputation and Opinion Evidence*

As late as the mid-1970's, a defendant charged with forcible rape generally was permitted to offer evidence of the complainant's general reputation for unchastity on the issue of whether she consented to sexual intercourse with the defendant on the occasion in question.⁵⁸ Most rape shield statutes now regulate the use of such evidence. Such statutes can be divided into the following categories:

1. *Explicit exclusion.* A number of state statutes explicitly exclude reputation and opinion evidence including: Idaho,⁵⁹ Iowa,⁶⁰ Louisiana,⁶¹ Maine,⁶² Maryland,⁶³ Mississippi,⁶⁴ Missouri,⁶⁵ North Carolina,⁶⁶ Oregon,⁶⁷ Pennsylvania,⁶⁸ and Texas.⁶⁹

2. *Exclusion by implication.* Other statutes governing admissibility of the complainant's past sexual behavior are concerned only with the circumstances under which specific act evidence may be admitted, without explicit mention of reputation or opinion evidence. As such, these statutes exclude reputation and opinion evidence by implication. Examples include FRE 412⁷⁰ and the rape shield provisions of Minnesota⁷¹ and

(Wash. Ct. App. 1981), *rev'd*, 659 P.2d 514 (Wash. 1983)). The court reasoned that because a rape shield law precludes the defendant from introducing relevant evidence, it could pass constitutional muster only if justified by a compelling state interest. *Id.* at 522.

57. *Id.* at 521.

58. See Karnezis, *supra* note 16, at 1187.

59. IDAHO R. EVID. 412(a).

60. IOWA R. EVID. 412(a).

61. LA. CODE EVID. ANN. 412(A) (West 1995).

62. ME. R. EVID. 412(a).

63. MD. ANN. CODE art. 27, § 461A(a) (1992).

64. MISS. R. EVID. 412(a).

65. MO. ANN. STAT. § 491.015(1) (Vernon 1992 & Supp. 1995).

66. N.C. R. EVID. 412(c).

67. OR. R. EVID. 412(1).

68. 18 PA. CONS. STAT. ANN. § 3104(a) (1983).

69. TEX. R. EVID. 412(a).

70. FED. R. EVID. 412(a)-(b). Until its recent amendment, 412(a) explicitly excluded such evidence. See *supra* note 28 (listing the pre-amended version of Rule 412).

71. MINN. R. EVID. 412(1)(A)(i) (allowing evidence of the complainant's previous sexual conduct on the issue of consent only if the evidence establishes "a common scheme or

New Jersey.⁷²

3. *Admissible under some circumstances.* Some statutes dictate that a court may admit reputation and opinion evidence upon a finding that its probative value outweighs its inflammatory or prejudicial nature. Included in this category are rape shield provisions of Georgia,⁷³ New Mexico,⁷⁴ and Tennessee.⁷⁵

4. *Admissibility unclear.* A few legislatures worded their statutes so vaguely that it is unclear whether they restrict reputation or opinion evidence at all.⁷⁶

Exclusion of reputation and opinion testimony constitutes a legislative finding that evidence of a woman's reputation regarding sexual behavior is *never* relevant enough to be admitted.⁷⁷ This finding effects a worthwhile change, not merely in the law of evidence, but the substantive law of rape as well: a defendant can no longer rely upon what he had heard about the complainant to justify a reasonable belief that she consented to have sex with him.

plan of similar sexual conduct under circumstances similar to the case at issue . . .").

72. N.J. STAT. ANN. § 2C:14-7(c) (West 1994 & Supp. 1995) (allowing evidence of previous sexual conduct to be offered only if it concerned the source of the semen); *cf.* *State v. Ogburne*, 561 A.2d 667, 670 (N.J. Super. Ct. App. Div. 1989) (denying the defendant's request to inquire if the complainant was a virgin and limiting questioning about previous conduct to four days prior to the alleged assault).

73. GA. CODE ANN. § 24-2-3 (1982). The statute provides that a complainant's "general reputation for promiscuity, nonchastity, or sexual mores contrary to the community standards" is admissible if the judge, after an in camera hearing, finds that the reputation evidence "directly involved the participation of the accused or finds that the evidence expected to be introduced supports an inference that the accused could have reasonably believed that the complaining witness consented to the conduct complained of in the prosecution." *Id.*

74. New Mexico's rape shield statute provides:

EVIDENCE OF THE VICTIM'S PAST SEXUAL CONDUCT. In prosecutions under Sections 30-9-11 to 30-9-15 NMSA 1978, evidence of the victim's past sexual conduct, opinion evidence thereof or of reputation for past sexual conduct shall not be admitted unless, and only to the extent that the court finds, that evidence of the victim's past sexual conduct is material and relevant to the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

N.M. R. EVID. 413(A).

75. The Tennessee Rules of Evidence admit such evidence if a judge finds after a hearing that "the probative value of the evidence outweighs its unfair prejudice to the victim" TENN. R. EVID. 412(d)(4).

76. In Rhode Island, Rule 412 merely provides that if a defendant seeks to offer proof "that the complaining witness has engaged in sexual activities with other persons," the judge at a hearing "shall rule upon the admissibility of the evidence offered." R.I. R. EVID. 412. In *State v. Jette*, however, the Rhode Island Supreme Court held that the defendant cannot impeach the complaining witness' credibility by presenting evidence of her reputation for unchastity. 569 A.2d 438, 441-42 (R.I. 1990).

77. See, e.g., 124 CONG. REC. 34912, 34913 (1978) (statement of Mr. Mann).

Defendants occasionally offer expert opinion testimony on complainant's competency and credibility.⁷⁸ Courts are divided on whether a court has authority to order a sexual offense complainant to undergo a mental examination to determine her competency or credibility.⁷⁹

II. ADMISSIBILITY OF COMPLAINANT'S PAST SEXUAL CONDUCT TO REBUT PHYSICAL EVIDENCE

Most rape shield statutes authorize the trial judge to admit evidence of the complainant's prior sexual conduct if relevant to rebut physical evidence, such as evidence of the source of semen or injury, offered by the prosecution.⁸⁰ FRE 412(b)(1)(a), for example, states that if a defendant provides pretrial notice, he may offer "evidence of specific instances of sexual behavior of the alleged victim . . . to prove that a person other than the accused was the source of semen, injury, or other physical evidence" Some corresponding state provisions are worded more broadly by also permitting the introduction of evidence regarding pregnancy⁸¹ and disease.⁸² Courts in states whose statutes lack such a provision acknowl-

78. *State v. Bingham*, 776 P.2d 424, 428 (Idaho 1989), *overruled by State v. Pizzuto*, 810 P.2d 680 (Idaho 1991); *State v. Hoisington*, 657 P.2d 17, 29 (Idaho 1983).

79. Gregory D. Sarno, Annotation, *Necessity or Permissibility of Mental Examination to Determine Competency or Credibility of Complainant in Sexual Offense Prosecution*, 45 A.L.R.4TH 310, 315 (1986).

80. See, e.g., FED. R. EVID. 412(b)(1); COLO. REV. STAT. ANN. § 18-3-407(1)(b) (West 1990); FLA. STAT. ANN. § 794.022(2) (West 1995); IDAHO R. EVID. 412(b)(2)(A); IOWA R. EVID. 412(b)(2)(A); LA. CODE EVID. ANN. art. 412(B)(1) (West 1995); MD. ANN. CODE art. 27, § 461A(a)(2) (1992); MICH. COMP. LAWS ANN. § 750.520j(1)(b) (West 1992); MINN. R. EVID. 412(1)(B); MISS. R. EVID. 412(b)(2)(A); MO. ANN. STAT. § 491.015.1(2) (Vernon 1994); N.J. STAT. ANN. § 2C:14-7(c) (West 1993); OHIO REV. CODE ANN. § 2907.02(D) (Anderson 1993); ORE. R. EVID. 412(2)(b)(B); TENN. R. EVID. 412(c)(4)(ii); WIS. STAT. ANN. § 972.11(2)(b)(2) (West 1992). Courts in several states whose statutes lack such a provision have held likewise. See *State ex rel. Pope v. Superior Court*, 545 P.2d 946, 953 (Ariz. 1976); *State v. Cosden*, 568 P.2d 802, 806 (Wash. Ct. App. 1977), *cert. denied*, 439 U.S. 823 (1978).

81. Colorado: COLO. REV. STAT. § 18-3-407(a)(b) (1992).

Florida: FLA. STAT. ANN. § 794.022(2) (West 1992).

Maryland: MD. ANN. CODE art. 27, § 461A(a)(2) (1992).

Michigan: MICH. COMP. LAWS ANN. § 750.520j(1)(b) (West 1991).

Minnesota: MINN. R. EVID. 412(1)(B).

Mississippi: MISS. R. EVID. 412(b)(2)(A).

Missouri: MO. ANN. STAT. § 491.015.1(2) (Vernon 1992).

New Jersey: N.J. STAT. ANN. § 2C:14-7(1)(c) (West 1992).

Ohio: OHIO REV. CODE ANN. § 2907.02(D) (Anderson 1993).

Wisconsin: WIS. STAT. ANN. § 972.11(2)(b)(2) (West 1992).

82. Colorado: COLO. REV. STAT. § 18-3-407(a)(b) (1992).

Florida: FLA. STAT. ANN. § 794.022(2) (West 1992).

Maryland: MD. ANN. CODE art. 27, § 461A(a)(2) (1992).

Michigan: MICH. COMP. LAWS ANN. § 750.520j(1)(b) (West 1991).

edge that, in appropriate circumstances, admission of such evidence is constitutionally required.⁸³

A. Source of Semen

This issue will most likely arise when the defendant denies having intercourse with the complainant. The prosecutor will offer evidence that semen was found in the complainant (or on her clothing, sheets, etc.) to corroborate, at least, her testimony that intercourse occurred. The defendant then will seek to prove that the complainant had intercourse with someone else contemporaneous to the alleged rape.⁸⁴ Courts tend to admit such evidence if the complainant's alleged intercourse with another occurred within a few days of the complainant's physical examination following the alleged rape, i.e., within the period that semen from the prior act would remain motile.⁸⁵ If the time is longer than a few days, however,

Minnesota: MINN. R. EVID. 412(1)(B).

Mississippi: MISS. R. EVID. 412(b)(2)(A).

Missouri: MO. ANN. STAT. § 491.015.1(2) (Vernon 1992).

New Jersey: N.J. STAT. ANN. § 2C:14-7(1)(c) (West 1992).

Ohio: OHIO REV. CODE ANN. § 2907.02(D) (Anderson 1993).

Tennessee: TENN. R. EVID. 412(c)(4)(ii).

Wisconsin: WIS. STAT. ANN. § 972.11(2)(b)(2) (West 1992).

83. Cf. *Pope*, 545 P.2d at 953; *Commonwealth v. Majorana*, 470 A.2d 80, 84 (Pa. 1983); *Cosden*, 568 P.2d at 806.

84. The probative value of such evidence may depend considerably upon whether tests have been performed comparing the defendant's DNA with that of the semen found in the complainant.

85. Courts have held that it was error to exclude:

—testimony that earlier in the night of the alleged rape complainant told a man other than the defendant that she wanted to have sex with him, that the witness had subsequently seen complainant emerging from the woods with her pants unbuttoned after 15-30 minutes alone with that man and that complainant told the witness, "I finally got it." *State v. Rinaldi*, 599 A.2d 1, 4-7 (Conn. 1991).

—results of two secretor semen tests which indicated defendant probably did not produce the semen collected from complainant, and the cross-examination of complainant concerning the other source, limited to the morning of the alleged assault. This evidence, coupled with inconsistent statements regarding her last date of intercourse and the fact that two hours and fifteen minutes elapsed between her husband's early morning departure and her report of rape, supported the inference she had engaged in consensual extramarital intercourse, and would be relevant to a potential motive to fabricate rape. *State v. Hagen*, 391 N.W.2d 888, 891-92 (Minn. Ct. App. 1986).

—complainant's comments to the examining physician about sexual relations with her boyfriend on the night defendant allegedly attacked her. *State v. Gibson*, 636 S.W.2d 956, 958-59 (Mo. 1982).

—cross-examination of the complainant with regard to her sexual activities on the day preceding the alleged rape, precluding an attempt to establish that she had sexual relations with someone other than the defendant which accounted for the presence of sperm in her vagina on the day of the alleged rape. *State v. LaClair*, 433 A.2d 1326, 1329 (N.H. 1981).

—evidence of possible consensual intercourse between the complainant and her boy-

courts generally exclude evidence of prior sexual conduct.⁸⁶ If the time between the prior conduct and the alleged incident was fairly brief, courts still retain discretion to exclude the evidence if other facts render its pro-

friend on the evening of the alleged rape. *Commonwealth v. Taylor*, 487 A.2d 946, 947 (Pa. Super. Ct. 1985) (per curiam).

—evidence that the complainant had sex with her boyfriend the night before she was allegedly raped. *State v. Gibbons*, 418 A.2d 830, 836-37 (R.I. 1980).

Similarly, see *State v. Ogburne*, 561 A.2d 667, 668 (N.J. Super. Ct. App. Div. 1989) and *Commonwealth v. Jorgenson*, 517 A.2d 1287, 1289-90 (Pa. 1986) (each holding that the defendant was entitled to a hearing in order to determine the admissibility of evidence that complainant had sex with another man prior to the alleged rape; three or four days in *Ogburne*, minutes or hours in *Jorgenson*).

See also *Majorana*, 470 A.2d at 85 (holding that the trial court erroneously excluded the defendant's testimony that he had consensual intercourse with the complainant two hours before the alleged rape).

But see *State v. Cervantes*, 881 P.2d 151, 152 (Or. Ct. App. 1994) (holding that the trial court properly excluded evidence that just prior to the rape the complainant was seen "hanging all over" another man because the defendant could not prove that the complainant had sex with that man and the complainant denied it).

86. In Louisiana, the rape shield statute expressly limits evidence of prior sexual conduct to intercourse that occurred within seventy-two hours of the alleged offense. LA. R. EVID. 412(B)(1). Courts have excluded evidence relating to intercourse that preceded the alleged rape by:

—five days: *Lackey v. State*, 671 S.W.2d 757, 759 (Ark. 1984) (notwithstanding medical testimony that sperm might live for several days).

—four days: *State v. Young*, 668 S.W.2d 263, 265 (Mo. Ct. App. 1984) (noting that a physician testified at the *in camera* hearing that sexual relations which occurred four days prior to the alleged rape could not account for the presence of semen).

—four days: *Ogburne*, 561 A.2d at 670.

—seventy-two hours: *Darrow v. State*, 451 So. 2d 394, 396 (Ala. Crim. App. 1984).

See also *Cosden*, 568 P.2d at 802. The court upheld the exclusion of evidence that the complainant had engaged in sexual intercourse four days prior to the alleged rape, which defendant offered to corroborate his medical expert's testimony. *Id.* at 807. The expert testified that so few sperm were found in her vagina within twelve hours after the alleged act of intercourse with the defendant that intercourse must have occurred more than 12 hours prior to the pelvic examination. *Id.* at 805. The expert also testified, however, that a douche or thorough washing after intercourse could account for the sparsity of sperm, and the complainant testified that she took a bath prior to the hospital tests, which, the court stated, greatly weakened the probative value of the offered testimony. In any event, the offered evidence would not have explained the presence of sperm on the clothes of both the defendant and the complainant. *Id.* at 807.

Similarly, see *Pack v. State*, 571 P.2d 241, 245 (Wyo. 1977) (admitting evidence of complainant's recent sexual relations prior to the alleged rape only if combined with an offer of medical testimony showing that motile sperm could survive the intervening period); *State v. Cunningham*, 551 P.2d 605, 609 (Idaho 1976) (limiting such testimony to acts that occurred within the time limitation disclosed by the medical testimony).

The reliance on time is consistent with the legislative history of FRE 412. Speaking of the exceptions to the exclusion of specific act evidence generally, Congressman Mann, who sponsored FRE 412 on the floor of the House, commented: "The greater the lapse of time, of course, the less likely it is that such evidence will be admitted." 124 CONG. REC. 34912, 34913 (1978).

bative value dubious.⁸⁷

Occasionally a defendant, seeking to prove that he was *not* the source of semen, will seek to prove that the complainant did *not* have sex with multiple partners during the period in question. Because this evidence in no way contravenes the policies underlying the rape shield statutes, such statutes provide no basis to exclude it.⁸⁸

87. *Thomas v. State*, 471 N.E.2d 681, 683 (Ind. 1984), holding that the trial court did not abuse its discretion in precluding cross-examination of the complainant's sexual conduct with her boyfriend earlier during the day of the offense, even though the cross-examination might elicit evidence that could have accounted for the presence of semen in her vagina and scratches on her thighs. The Indiana Supreme Court recognized that there was ample evidence establishing the defendant's identity and the forcible nature of the attack; therefore, the slight probative value of the evidence was clearly outweighed by its prejudicial nature in embarrassing the complainant and subjecting her to public denigration.

In *Commonwealth v. Stansbury*, the defendant admitted having a sexual encounter with the complainant but insisted it was consensual. The trial court admitted evidence of sperm inside the complainant's vagina, although scientific tests were inconclusive as to whether defendant was the source, but excluded evidence of pubic hairs in the complainant's panties that did not belong to her or the defendant. 640 A.2d 1368, 1372 (Pa. Super. Ct. 1994). The Pennsylvania appellate court held that exclusion of evidence suggesting another man might have been the source of semen was not error given the defendant's acknowledgment that he had sex with the complainant. *Id.* A dissenting judge stressed that although defendant conceded a sexual encounter, he denied ejaculating inside the complainant's vagina; hence the pubic hairs should have been admitted to rebut the prosecutor's use of semen to corroborate the complainant's allegation of vaginal rape. *Id.* at 1373.

See also *Lassiter v. Georgia*, 333 S.E.2d 412 (Ga. Ct. App. 1985). In *Lassiter*, the complainant testified that she had spent the night with her boyfriend and was naked in bed when the defendant broke into her room, raped her, abducted her at gunpoint, and raped her again. *Id.* at 414. The defendant asserted an alibi defense, denying any connection with the complainant. *Id.* at 416-17. The trial court refused to allow the defendant to demonstrate that pubic hair, blood, saliva, and semen samples taken from defendant did not connect him in any way with the complainant while similar samples did connect her to her boyfriend. *Id.* at 416. The appellate court upheld the exclusion of such evidence based on the fact that the samples taken from the defendant were "inconsistent and inconclusive"—neither connecting the defendant with the victim nor ruling him out. *Id.* Thus, because such evidence could not have exonerated the defendant, the trial court properly excluded the evidence. *Id.* at 417.

88. See *Commonwealth v. Fitzgerald*, 590 N.E.2d 1151, 1152-55 (Mass. 1992). The complainant testified that she had sex with her boyfriend early on the morning of June 5, 1985, got drunk that night at a party at defendant's home, and awoke to find defendant on top of her having intercourse. *Id.* at 1152. The defendant did not contest that complainant was raped, but argued that complainant misidentified her attacker. *Id.* at 1154. The defendant presented evidence that he had a vasectomy several years earlier and therefore secreted no sperm; that the crotch area of complainant's underpants revealed the presence of bodily fluids from someone who secreted type B-antigens and, therefore, was a member of blood group B; and that neither the complainant, her boyfriend, nor the defendant has type B blood. *Id.* at 1153. The defendant also sought to ask complainant whether she had intercourse with anyone other than her attacker on the night of the rape. *Id.* at 1155. The defendant clearly hoped for a negative answer, which would point to the B-antigen secretor, rather than the defendant, as the rapist. *Id.* The trial judge, invoking the state's rape shield statute, held that the question was speculative, irrelevant and improper unless de-

B. "Injury"; Loss of Virginity; Emotional Trauma

FRE 412 and numerous state statutes authorize admission of prior sexual conduct evidence if it is sufficiently relevant to prove that someone other than the defendant was the source of the complainant's "injury."⁸⁹ The term "injury" obviously includes bruises, abrasions, scratches and other evidence of physical abuse. Not surprisingly, the injuries discussed most frequently in the case law are vaginal injuries. Lamentably, most of these cases involve girls in their early teens or even younger. Whether evidence of the complainant's prior sexual behavior with others is admissible in these cases depends primarily on whether the evidence is truly probative on the source of the injury.⁹⁰

1. Virginity—Adult Complainant

Rape shield laws exclude evidence of a complainant's "past sexual behavior." Clearly, it is improper for a defendant to ask a complainant on cross-examination if she was a virgin prior to the alleged rape.⁹¹ Logic

fendant could identify the B-secretor. *Id.* at 1154. The Massachusetts Supreme Court held that the trial court committed reversible error. *Id.* at 1156. The statute prevents a defendant from eliciting evidence of a complainant's promiscuity as part of a general credibility attack. The defendant hoped to elicit evidence that the complainant was *not* promiscuous; such evidence would not be banned by the statute. *Id.* at 1155-56.

89. FED. R. EVID. 412; *see also supra* notes 80-82 (listing statutes with this provision).

90. *United States v. Azure*, 845 F.2d 1503, 1505 (8th Cir. 1988). In a prosecution of her mother's common law husband for statutory rape, physicians testified that the ten-year-old complainant had suffered a three-centimeter laceration on her vaginal wall caused by a recent penetration. *Id.* at 1504. The trial court excluded the testimony of a thirteen-year old boy who claimed, at a Rule 412 hearing, to have had consensual sex with the complainant on a few occasions at unspecified times prior to the occasion in question. *Id.* at 1506. The Eighth Circuit held that the trial court committed no error by excluding that evidence. *Id.* The boy testified that he never forced the complainant and that she never cried. *Id.* Thus, even if his allegations were true (which the court, stressing the vagueness and self-contradictory nature of much of his testimony, doubted), the complainant's conduct with him could not have been the source of the injury. Unaccountably, the Eighth Circuit undermined much of what Rule 412 is intended to accomplish by reciting the full names of the complainant and her mother and sisters. *Id.* at 1504.

United States v. Eagle Thunder, 893 F.2d 950 (8th Cir. 1990). In a prosecution for kidnapping and sexually abusing an eleven-year old girl, it was not error to exclude evidence of a "non-recent tear" in the girl's hymenal ring, because its existence "was not relevant to the source of the tears that were [only] hours old." *Id.* at 954.

State v. Nelson, 453 N.W.2d 454 (Neb. 1990). Evidence that the complainant had sexual intercourse three days before the alleged attack was not admissible to explain her injuries (including scratches on her calf and back, bruises on her left shoulder, and a bruised area on the right perineal region, on the right side of the crotch), which, according to medical testimony, occurred less than a day before the examination. *Id.* at 459-60.

91. *State v. Ogburne*, 561 A.2d 667, 670 (N.J. Super. Ct. App. Div. 1989); *see also State v. Galloway*, 284 S.E.2d 509, 513 (N.C. 1981) (stating that although a physician mentioned several times in his testimony that his examination was consistent with a virginal pelvic

suggests that, barring unusual circumstances, the prosecution likewise should not be permitted to present evidence that, until the alleged rape, the complainant was a virgin. If a defendant is not permitted to argue, "She willingly had sex with other men, therefore she willingly had sex with me," the State similarly should not be permitted to argue, "She never consented to anyone previously, so it is unlikely she consented with defendant."⁹² At least one court has held that, in this situation, the defendant can rebut the complainant's testimony.⁹³

2. *Virginity—Child Complainant*

In a prosecution for sexual abuse of a child, medical evidence that the complainant was *not* a virgin may be relevant in ways unrelated to consent. Evidence that her hymenal opening was enlarged or torn circumstantially corroborates that at some point an act of intercourse occurred. In a case involving a girl of tender years, this fact alone may also help persuade the jury that the defendant abused her — particularly if he was the only adult male in the household, and consequently had unique access to and control over the child. Evidence that the tear occurred recently can circumstantially corroborate the complainant's testimony as to when the abuse occurred. This may also circumstantially corroborate the defendant's identification as the perpetrator.

If the prosecutor offers such evidence, the consensus is that, in appropriate circumstances, the defendant must be permitted to offer evidence that someone else was the cause of the enlarged vaginal opening.⁹⁴

exam, he also stated once that the use of the medical term virginal did not imply its non-technical meaning; hence, his testimony did not open the door to cross-examining the complainant as to whether she had been a virgin).

92. See, e.g., *Veal v. State*, 382 S.E.2d 131, 132 (Ga. Ct. App. 1989) (holding that it was error to deny defendant's motion *in limine* to preclude complainant from testifying that she told defendant during the attack that she was a virgin, because the rape shield statute superseded all evidentiary exceptions including the *res gestae* rule; also holding, however, that the error resulted in no harm to defendant).

See also Dag E. Ytreberg, Annotation, *Admissibility of Prosecution Evidence on Issue of Consent, That Rape Victim Was a Virgin, Absent Defense Attack on Her Chastity*, 35 A.L.R.3d 1452, 1453-54 (1971).

93. *Government of the Virgin Islands v. Jacobs*, 634 F. Supp. 933, 936, 940 (D.V.I. 1986) (basing its conclusion on FRE 412(b)(1), the "constitutionally required" provision); see also *Johnson v. State*, 632 A.2d 152, 155 (Md. 1993) (applying MD. ANN. CODE art. 27, § 461A(a)(4) (1992) which allows for the "defendant's right to inquire into the bias or prejudice of the victim" regarding the complainant's motive for making a false accusation); *State v. Carpenter*, 459 N.W.2d 121, 126-27 (Minn. 1990) (acknowledging that in a trial for forcible rape, evidence of the complainant's prior virginity "might" entitle defendant to rebut such evidence under the "constitutionally required" provision).

94. See *Tague v. Richards*, 3 F.3d 1133, 1135-36 (7th Cir. 1993). An eleven-year-old girl accused her adult neighbor of rape. The court held that, in light of medical testimony

Courts may exclude such evidence, where its probative value is comparatively minimal.⁹⁵ A few courts, however, hold that such evidence is ex-

which stated an examination three months later showed hymenal damage, it violated the defendant's Confrontation Clause rights to exclude evidence that the complainant had been raped by her father at age six; this error, however, was found to be harmless. *Id.* at 1140; *see infra* note 96 (discussing other relevant cases).

See also *United States v. Begay*, 937 F.2d 515 (10th Cir. 1991). The prosecutor had "specifically relied" upon the eight-year-old complainant's unusually enlarged hymenal opening and a vaginal abrasion as evidence of defendant's guilt, it was therefore reversible constitutional error to exclude evidence of an earlier assault upon her by someone else. *Id.* at 523.

In *Oswald v. State*, the court agreed that where a state offers medical evidence that the complainant has a ruptured hymen, most likely from sexual intercourse, it is permissible for the defendant to show she engaged in sexual relations with others. 715 P.2d 276, 278 (Alaska Ct. App. 1986). The opinion does not indicate the complainant's age.

See also *Audano v. State*, 641 So. 2d 1356, 1360 (Fla. Dist. Ct. App. 1994) (announcing a blanket rule that "[i]f the state introduces [medical] evidence . . . that a child has engaged in sexual intercourse, then the defendant is entitled to introduce evidence that the child had previously engaged in sexual intercourse with persons other than the defendant"). In *Audano*, the court admitted evidence that the thirteen-year-old complainant had been sexually abused by her mother. *Id.* at 1360-61.

Steward v. State, 636 N.E.2d 143, 150 (Ind. Ct. App. 1994) (reversing a police officer's conviction for molesting twelve and fifteen-year-old sisters where evidence of prior molestations tending to explain the children's behavior as consistent with child sex abuse syndrome was excluded); *Saylor v. Indiana*, 559 N.E.2d 332, 335 (Ind. Ct. App. 1990) (holding that the trial court committed reversible error by excluding evidence of prior molestations); *see infra* note 99 (concerning evidence of child sex abuse syndrome).

Barnett v. Commonwealth, 828 S.W.2d 361 (Ky. 1992). Prosecuting the defendant for sexually abusing his less-than-twelve-year-old daughter, the government offered medical evidence that she had experienced "chronic sexual contact." *Id.* at 362. The Kentucky Supreme Court held that it was error to exclude evidence indicating that complainant's brother, not defendant, had been her sexual partner. *Id.* at 363. "[I]n the case of a female child who is presumed not to be sexually active, and with whom any sexual contact is prohibited, a medical finding of frequent sexual activity establishes the relevance of evidence that the perpetrator is one other than the person charged." *Id.* The court found "manifest error" even though the defendant's trial counsel "conceded" that the evidence was barred by the state rape shield statute. *Id.*

Goodson v. State, 566 So. 2d 1142 (Miss. 1990). "[E]mpirical data aside, many believe a teenage girl may only lose her hymenal ring through sexual experience." *Id.* at 1148-49 (citation omitted). Hence, the fourteen-year-old complainant's testimony that the defendant, her uncle, had molested and raped her at various times between the ages of six and ten, coupled with medical testimony that her hymenal ring was gone, clearly pointed to the conclusion that defendant had caused the loss of her hymenal ring by raping her. *Id.* at 1149. "As the point was central to the prosecution's case," the trial judge should have permitted defendant to impeach her with a prior inconsistent statement made to a friend that she had sex with a boyfriend after her family moved away from her uncle's town but before the medical exam. *Id.*

95. *State v. Zierhut*, 631 So. 2d 1378, 1381 (La. Ct. App. 1994) (holding that when a fourteen-year-old girl accused her father of rape, medical testimony that she had a small scar on the posterior fourchette of the vagina did not require admitting evidence that the girl had been raped by an uncle when she was six because no emphasis was placed on the scar as proof that defendant had raped his daughter).

cluded per se by rape shield legislation.⁹⁶ One court, in an unusual situation, held that a prosecutor could not rebut the defendant's version of events by offering evidence that the child complainant was a virgin.⁹⁷

State v. Laird, 732 P.2d 417 (Mont. 1987). Evidence of a possible prior "assault" on a nine-year-old child was not admissible to explain medical evidence that indicated she had been raped, because insufficient details about the prior assault were known. *Id.* at 420. There was some indication that a man who picked the child up on the street as she was walking home from school assaulted her. The child, however, could not recall the man's name and was not able to describe what had occurred. *Id.* at 419-20.

State v. Peyatt, 315 S.E.2d 574 (W. Va. 1983). In a prosecution of a father for incest and sexual assault of his twelve-year-old daughter, the trial court properly excluded indirect evidence of sexual intercourse between the complainant and other men. This evidence was excluded even though the prosecution allegedly put her past sexual conduct into issue when the prosecution's expert testified that the twelve-year-old victim had the genitalia of a married woman and the complainant testified that the only penis she had ever seen was her father's. *Id.* at 579. The defendant elicited testimony from the complainant's mother and siblings as to her past conduct with several males, but it was unclear from their testimony whether the complainant's sexual activities with those males included sexual intercourse. *Id.* at 580. The defendant was remiss, according to the court, for failing to subpoena these males if he wished to pursue the issue. *Id.*

96. *United States v. Shaw*, 824 F.2d 601 (8th Cir. 1987), *cert. denied*, 484 U.S. 1068 (1988). In a prosecution of a foster father for sexual abuse of an eleven-year-old girl, after the Government introduced physical evidence that complainant had engaged in sexual activity, the trial court did not permit several boys to testify that they had intercourse with the complaining witness (one of whom claimed he had intercourse with her 50 times). *Id.* at 603. The Eighth Circuit held that the trial court committed no error by excluding this testimony. *Id.* at 608. "[T]here is nothing in the legislative history to Rule 412 indicating that we should expand the word 'injury' beyond its commonly understood meaning. . . . [C]alling the physical consequences to [the complainant's] hymen an 'injury' would contradict Congress' intention to subject Rule 412 to stringent temporal limitations." *Id.* at 607. The court also suggested that the probative value of the proffered evidence was outweighed by its unfair prejudicial impact. *Id.* at 606. In subsequent cases, the Eighth Circuit has excluded such evidence on the facts, rather than on a general principle of exclusion. See *United States v. Azure*, 845 F.2d 1503, 1505 (8th Cir. 1988) and *United States v. Eagle Thunder*, 893 F.2d 950, 954 (8th Cir. 1990) (described *supra* note 90).

State v. Carpenter, 459 N.W.2d 121 (Minn. 1990). The complainant, fourteen, testified that the defendant, a church counselor, had been the first to penetrate her; medical testimony indicated, however, that she had a hymenal scar that could have predated the incident in question. *Id.* at 125. The Minnesota Court held that under Minnesota's rape shield statute (since redesignated as 412(c)(1)(B)), the defendant was not entitled to call a witness to testify that prior to the incident in question he had penetrated her digitally. *Id.* at 126 (citing MINN. R. EVID. 404(c)(1)(B)). In explaining why admission of the evidence was not constitutionally required, the court stressed that the defendant had not complied with the statutory notice requirement and had already managed (despite a court order to the contrary) to insinuate the contested information, and much more, before the jury. *Id.* at 126-27.

Similarly, see *Lewis v. State*, 451 N.E.2d 50, 53 (Ind. 1983) (taking the same approach in interpreting Indiana's rape shield law). *Contra* *Tague v. Richards*, 3 F.3d 1133, 1135-36 (7th Cir. 1993) (holding that this approach violated the Sixth Amendment's Confrontation Clause, although this was harmless error).

97. *Commonwealth v. Reed*, 644 A.2d 1223, 1231 (Pa. Super. Ct. 1994). The defendant was accused of indecent assault on his son's fourteen-year-old ex-girlfriend. *Id.* at

3. Emotional Trauma

Courts often must address the question of whether "injury" should include the emotional trauma and the fear of pregnancy and infection which frequently accompany sexual assault. Although each may in a very real sense injure a rape victim, to interpret the statutory term injury broadly enough to include these harms may undermine the very protection the rule is designed to afford.⁹⁸ A prosecutor could undermine this protection by using evidence of the complainant's emotional distress to corroborate her assertion that the defendant raped her. In this setting, a defendant may have the right to offer evidence suggesting someone else had raped the complainant on a prior occasion and that the prior assault, not the defendant's alleged conduct, was the source or cause of the trauma.⁹⁹

1224. He claimed that he should be convicted of only corrupting a minor because she consented to the sexual behavior (which did not involve penetration because, according to defendant, he did not have a condom) and, in fact, she boasted about her previous sexual experience. *Id.* at 1228-29. To rebut this defense, the prosecutor introduced medical testimony that the complainant was a virgin, and used this evidence on summation to argue the absurdity of the defendant's version of events. *Id.* at 1230. The Pennsylvania appellate court held that the trial court committed reversible error by not allowing the defendant to cross-examine the complainant about an improper motive and whether the complainant previously had intercourse. *Id.* at 1231. " 'The Rape Shield Law was intended to be a shield not a sword.' " *Id.* (quoting *Pennsylvania v. Berkowitz*, 609 A.2d 1338, 1352 (Pa. Super. Ct. 1992)). Evidence of the complainant's prior sexual experience, or lack thereof, was "irrelevant" whether offered to corroborate or rebut the defendant's version of events. *Id.*

98. [I]f the term 'injury' embraces psychological damage, the accused is likely to argue that the true causes of such damage lie in sexual experiences of the complainant having no relation to the crime charged, and to offer as evidence in support of this defense the sexual history of the complainant. Ultimately the defense argument would be that the complainant is 'biased' or 'sick' and trying to find a scapegoat for her difficulties.

2 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, *FEDERAL EVIDENCE* § 198, at 611 (1985 rev. vol. & Supp. 1993).

99. *Steward v. State*, 636 N.E.2d at 150. The prosecutor offered evidence that a fifteen-year-old complainant's behavior was consistent with the child sexual abuse syndrome, including the fact that her behavior improved once she identified the defendant as her abuser. The court held it was error to exclude evidence that she also identified four other men who allegedly molested her. *Id.* This evidence reasonably supported the defendant's theory that they, not he, had molested her and that the improvement in her behavior was attributable to her identification of them. *Cf.* *State v. Huebner*, 513 N.W.2d 284 (Neb. 1994). An expert, who had not examined the complainant, testified in general terms that children sometimes delay in reporting that they were abused for a variety of reasons, but did not testify regarding the specific reasons for which this complainant waited nearly seven months. *Id.* at 290-91. The court held that this did not open the door to evidence that she had been assaulted a few years earlier by another male. *Id.* at 291.

For a case falling roughly halfway between *Steward* and *Huebner*, see *Connecticut v. Christiano*, 637 A.2d 382 (Conn. 1994). The defendant was charged with raping his mildly

C. Infection

Evidence that relates to a sexually transmitted disease (STD) may be relevant in a variety of circumstances. A clear-cut case is presented when a vaginal smear taken from the complainant shows sperm carrying an STD, while a timely test of the defendant shows that he is free of that disease. Suppression of such evidence denies the defendant a fair trial because it strongly corroborates his denial that he did not have sex with the complainant on the occasion in question.¹⁰⁰

A somewhat different situation arises if the defendant denies having intercourse with the complainant and, in order to circumstantially corroborate his denial, wants to offer evidence that she is infected with a STD and that he is not. The fact that he did not catch her disease suggests that he did not have sex with her. Because such evidence indicates that the complainant has engaged in prior sexual conduct (from which she contracted the disease), courts have struggled with its admissibility.¹⁰¹ One court excluded testimony that the complainant, but not the defendant, had gonorrhea, because medical testimony indicated there was only one chance in three that he would have contracted the disease during intercourse with the victim.¹⁰² Another court excluded evidence that the com-

retarded foster daughter when she was twenty-one; she reported the abuse to the police two months later. *Id.* at 384. After the defendant, who denied any sexual contact with the complainant, sought to impeach her credibility by questioning her about the prolonged delay in bringing the charges, the prosecutor called an expert witness to answer hypothetical questions about why a child might delay reporting sexual abuse by a parent or other authority figure. *Id.* at 385. The expert emphasized that his opinion was based on his clinical experience, and that he had not examined the complainant. According to the court, the close parallel between the State's evidence and the hypothetical question did not open the door to evidence that the complainant had engaged in consensual intercourse with her natural brothers when she was eight and with her foster brothers when she was eleven or twelve:

[The expert's] testimony did not address these situations. A situation in which a very young girl is being sexually abused by her equally young brothers or foster brothers is not analogous to the situation described by [the expert], in which a victim delays disclosing abuse because of the power exerted by an abuser who is a parent, or one who is exercising parental authority. The proffered evidence was properly excluded as irrelevant.

Id. at 391.

100. *Ex Parte* Geeslin, 505 So. 2d 1246 (Ala. 1986). Suppression by the prosecutor of evidence that, shortly after the complainant reported that she was raped, a vaginal smear showed the presence of sperm carrying gonorrhea, coupled with evidence that twelve days later, a semen sample taken from defendant proved negative for the disease, deprived the defendant of a fair trial. *Id.* at 1248.

101. *State v. Ervin*, 723 S.W.2d 412, 415 (Mo. Ct. App. 1986) (noting the evidence's relevance, but the greater concern of protecting the victim).

102. *Id.* (excluding because the evidence would have an "inflammatory and prejudicial impact"). Perhaps influencing the court's decision was the fact that there was an eyewitness to the defendant "grab[bing] the [victim's] arm," and that the arresting officer testified

plainant had chlamydia¹⁰³ when she was raped because the defendant's negative medical culture for the disease, four months after the alleged rape, was inconclusive "as to whether he had intercourse with the [complainant] on the night of the assault."¹⁰⁴ Another court, by contrast, suggested that evidence that the complainant had chlamydia and the defendant did not must be admitted over a rape shield objection.¹⁰⁵

D. Pregnancy

Where penetration is a contested issue, most courts have allowed a prosecutor to offer evidence that penetration occurred and that the complainant became pregnant as a result of the alleged rape.¹⁰⁶ On the other hand, a court rejected evidence that a married complainant was pregnant with her husband's child at the time of the alleged rape as having no probative value while likely arousing the jury's indignation.¹⁰⁷

A defendant may not elicit the fact that the complainant was pregnant at the time of the alleged rape to imply her lack of chastity.¹⁰⁸ Where the

that the victim had a red mark on her face which was consistent with the victim's claim that the defendant had struck her. *Id.* at 414. Absent this evidence, the court may have decided the gonorrhea issue differently.

103. PERSONAL HEALTH REPORTER 111 (Alan M. Rees & Charlene Willey eds., 1993) (reporting that "chlamydia can be cured quickly and painlessly with antibiotics").

104. *State v. Jarry*, 641 A.2d 364, 366 (Vt. 1994).

105. *State v. Steele*, 510 N.W.2d 661 (S.D. 1994). The complainant alleged the defendant subjected her to a continuous and brutal two-and-one-half to three hour rape; the defendant testified to two incidents of brief consensual sex. *Id.* at 666. After the defendant was convicted, his attorney learned that the prosecutor had suppressed information that the complainant had originally accused him of giving her chlamydia; the defendant and his wife both tested negative for the disease. *Id.* The court held that the evidence was relevant as to which version of the events in question was the truth. *Id.* Moreover, evidence that the complainant had the disease was not banned by the rape shield statute, as it was not evidence of "specific instances . . . of prior sexual conduct." *Id.* at 667 (emphasis omitted). Hence, its suppression by the prosecutor deprived defendant of a fair trial and due process of law. *Id.*

106. *Hall v. State*, 378 So. 2d 1193, 1195 (Ala. Crim. App. 1979), *cert. denied*, 378 So. 2d 1196 (Ala. 1980).

People v. Schober, 22 Cal. Rptr. 318, 320 (Cal. Ct. App. 1962).

Martin v. Commonwealth, 476 S.W.2d 834, 836 (Ky. 1972).

State v. Kitto, 373 N.W.2d 307, 312 (Minn. 1985).

State v. Stanton, 353 S.E.2d 385, 388 (N.C. 1987).

Shockley v. State, 585 S.W.2d 645, 649 (Tenn. Crim. App. 1978).

Contra State v. Chambers, 309 P.2d 1055, 1057 (Wash. 1957) (holding that pregnancy is irrelevant where the issue to be resolved is consent).

See generally Annotation, *Admissibility, in Nonstatutory Rape Prosecution, of Evidence of Pregnancy of Prosecutrix*, 62 A.L.R.2d 1083, 1084-85 (1958) (discussing case law pertaining to evidence of a rape complainant's pregnancy).

107. *Wilson v. State*, 70 S.E. 1128, 1135 (Ga. Ct. App. 1911).

108. *State v. Smith*, 250 So. 2d 724, 725 (La. 1971); *Commonwealth v. Pilosky*, 362 A.2d 253, 256 (Pa. Super. Ct. 1976).

government uses the complainant's pregnancy to corroborate her testimony, however, such evidence plays the same role as evidence of semen or injury. Therefore, the defendant should maintain the right to rebut it with evidence (assuming it is of sufficient probative value¹⁰⁹) that another man is the father. Several states' rape shield statutes so provide.¹¹⁰ Where the defendant argues that the complainant's pregnancy by another man motivated her to accuse him falsely of rape, the admissibility of such evidence depends upon an assessment of its probative value and the risk of unfair prejudice or unnecessary embarrassment.¹¹¹

If a complainant is pregnant with another man's child when she testifies and the timing indicates that the jury might believe that the child is the defendant's, the fact of her pregnancy should, if possible, be concealed from the jury.¹¹² If it is not possible to conceal the pregnancy, the court

109. *Cf.* *State v. Miller*, 870 S.W.2d 242, 244-45 (Mo. Ct. App. 1994) (noting that in a prosecution for consensual statutory rape of a fourteen-year-old, after the trial judge permitted defendant to cross-examine complainant as to whether she had sex with two others during the relevant period, it was proper to preclude further inquiry into her "dating relationships" with others during that time).

110. COLO. REV. STAT. § 18-3-407(b) (1986) (evidence is admissible to show that "the act or acts charged were or were not committed by the defendant").

FLA. STAT. ANN. § 794.022(2) (West 1992) (evidence is admissible if it "may prove that the defendant was not the source of the . . . pregnancy").

MINN. R. EVID. 412(1)(B) (evidence is admissible "to show the source of the . . . pregnancy").

MISS. R. EVID. 412(b)(2)(A) (evidence is admissible "upon the issue of whether the accused was or was not . . . the source of . . . pregnancy").

MO. ANN. STAT. § 491.015.1(2) (Vernon 1992) (evidence is admissible to "show [] . . . origin of pregnancy").

N.J. STAT. ANN. § 2C:14-7(1)(c) (West 1992) (evidence is admissible "to prov[e] that the source of . . . pregnancy . . . is a person other than the defendant").

111. *See State v. Parker*, 730 P.2d 921, 924-25 (Idaho 1986) (maintaining it was prejudicial error to exclude complainant's admission that she had left home just prior to the alleged rape because she was pregnant). In *Parker*, such evidence was probative of victim's motive to fabricate and, by trying to blame her pregnancy on rape, to deflect suspicion particularly on the part of her parents, that she had engaged in consensual sexual activity. *Id.* at 925.

Cf. State v. Robinson, 431 N.W.2d 165 (Wis. 1988). Excluding evidence of complainant's pregnancy and her desire to obtain an abortion did not violate the defendant's Fifth and Fourteenth Amendment right to present a defense or his Sixth Amendment Confrontation Clause right. *Id.* at 170-71. The defendant's post-trial assertions that he would not have assaulted his pregnant former girlfriend because he would not have wanted to harm the fetus he had fathered, and that complainant had a motive to testify falsely because she wanted to be free of his efforts to dissuade her from having an abortion, came too late to be a basis of relief. *Id.* at 171. The court also noted that there was no evidence to establish that complainant was in fact pregnant with defendant's child and that "the defendant's alleged opposition would have provided no legal impediment whatsoever to the complainant's obtaining an abortion." *Id.*

112. *Moore v. Duckworth*, 687 F.2d 1063, 1064 (7th Cir. 1982); *Moore v. State*, 393

should inform the jury that the child is not the defendant's.¹¹³

III. PRIOR CONSENSUAL SEX BETWEEN DEFENDANT AND COMPLAINANT

A significant number of rape shield statutes authorize the trial judge to admit evidence of the complainant's past sexual behavior with the defendant¹¹⁴ if offered to support a claim that the complainant consented to the conduct in question.¹¹⁵ Even in the absence of such a provision, this evidence may be sufficiently relevant that excluding it would violate a

N.E.2d 175, 177 (Ind. 1979).

113. *Duckworth*, 687 F.2d at 1067.

114. *Cf.* *People v. Wilhelm*, 476 N.W.2d 753, 759 (Mich. Ct. App. 1991), *cert. denied*, 113 S. Ct. 2359 (1993) (explaining that sexual conduct by the complainant with another man in the defendant's presence does not fall within the statutory category of activity with the defendant); *New York v. Goodwin*, 579 N.Y.S.2d 805 (N.Y. App. Div. 1992) (determining it was not error to preclude the defense counsel from questioning the complainant about an alleged incident in which she engaged in oral sex with a third person while defendant was present, as this did not involve prior sexual conduct with the defendant). *See infra* notes 136-42 and accompanying text (discussing the significance of the complainant engaging in group sex).

115. *See supra* note 30. Similarly, *see* GA. CODE ANN. § 24-2-3(b) (1992); IDAHO R. EVID. 412(b)(2)(B); IOWA R. EVID. 412(b)(2)(B); LA. CODE EVID. ANN. art. 412(B)(2) (West 1995); MINN. R. EVID. 412(1)(A); MISS. R. EVID. 412(b)(2)(B); MO. ANN. STAT. § 491.015.1(1) (Vernon 1992); N.C. R. EVID. 412(b)(3); 18 PA. CONS. STAT. § 3104(a) (1993); TENN. R. EVID. 412(c)(3); TEX. R. CRIM. EVID. 412(b)(2)(B); WASH. REV. CODE ANN. § 9A.44.020(2) (West 1993); *see also* N.J. STAT. ANN. § 2C:14-7(c) (West Supp. 1994) (allowing admission of evidence of previous sexual conduct if it is material to negating the element of force or coercion).

Some courts have held that merely asserting a defense of consent is not enough. The defendant must adduce some evidence at the rape shield hearing, by offer of proof or otherwise, tending to show that the complainant consented to the charged sexual offense, before a judge can consider admitting evidence of prior consensual sex between them at trial. *See, e.g., State v. Hopkins*, 377 N.W.2d 110, 117 (Neb. 1985); *State v. Herrera*, 582 P.2d 384, 393 (N.M. Ct. App. 1978).

These provisions provide no basis to admit such evidence if the defendant denies engaging in sexual behavior with the complainant at the time of the alleged rape or assault. *State v. Small*, 631 S.W.2d 616, 617 (Ark. 1982) (holding that prior sexual conduct is irrelevant where consent is not at issue); *People v. Smith*, 340 N.W.2d 855, 857 (Mich. Ct. App. 1983); *State v. Farmer*, 719 S.W.2d 922, 929 (Mo. Ct. App. 1986) (same); *People v. Westfall*, 469 N.Y.S.2d 162, 164 (N.Y. 1983); *State v. Graham*, 390 N.E.2d 805, 807 (Ohio 1979) (*per curiam*) (same); *State v. Bennett*, 637 P.2d 208, 210 (Or. Ct. App. 1981) (same). Even if the defendant denies having sex with the complainant on the occasion in question, however, prior consensual sex between them may be relevant to show a motive for a false accusation, e.g., revenge or spite, or an attempt to conceal her consensual intercourse with someone else. *See infra* part IV.

Such evidence may also be admissible if, in addition to or instead of a defense of consent, the defendant asserts the defense that he reasonably believed that complainant consented. *See infra* part VIII.B.3. (explaining the mistake of fact defense).

defendant's constitutional right to introduce relevant evidence.¹¹⁶

A. Relevance

Rape shield legislation is justified because (among other reasons) the traditional "yes/yes inference"¹¹⁷ has so little probative value. A woman's decision to have sex with a man on a particular occasion is based on a variety of factors—the time, the place, her state of mind or mood in general and, presumably most important, the man himself: his behavior toward her, what she knows about him, his appearance, and so forth. Thus, a woman's willingness to have sex with other men on other occasions is generally a very poor indicator of whether she consented to have sex with the defendant on the occasion in question.¹¹⁸

By contrast, evidence that a woman found the defendant attractive¹¹⁹ enough to have sex with him on a previous occasion could make it considerably more probable that she consented to have sex with him again on the occasion in question. Clearly it is reasonable to infer, absent evidence to the contrary, that the attraction was more or less the same on both occasions. If the attraction was the same, it is also reasonable to infer that her reaction was the same on both occasions.

These inferences are, of course, rebuttable. The man might have become physically less appealing in the interim; he may have behaved badly toward her; she may have learned something about him that diminishes him in her eyes; or the "spark" simply may have expired. Or the woman might have declined to have sex with him again because the circumstances were inconvenient, because she had since developed a relationship with someone else, or simply because she felt like saying no, as is her right regardless of how many people she willingly had sex with previously.¹²⁰

Despite their rebuttability, these inferences from consensual intercourse nevertheless carry substantial probative value. Moreover, evidence of prior consensual intercourse with the defendant is much less likely to embarrass or humiliate the complainant or unfairly prejudice the

116. *United States v. Saunders*, 736 F. Supp. 698, 703 (E.D. Va. 1990); *State v. Williams*, 477 N.E.2d 221, 226-28 (Ohio 1984), *aff'd*, 487 N.E.2d 560 (Ohio 1986).

117. See *supra* text accompanying note 21, and *infra* note 296 and accompanying text.

118. But see *infra* notes 320-48 and accompanying text (discussing patterns of behavior).

119. The word "attractive" encompasses both nonphysical and physical characteristics.

120. See *State v. Stellwagen*, 659 P.2d 167, 170 (Kan. 1983) (stating that the rape shield act sends a clear message to the courts that "a rape victim's sexual activity is generally inadmissible since prior sexual activity, even with the accused, does not of itself imply consent to the act complained of").

prosecution, than would, for example, evidence of general promiscuity. In many communities, an affair between an unmarried woman and an unmarried man no longer carries the social disgrace of a generation ago.¹²¹ Thus, there may be less reason to exclude such evidence.

Even if the prior relationship is of sufficient relevance to warrant admissibility, a judge retains discretion to restrict its admittance to protect the complainant to the extent possible consistent with the defendant's legitimate need for the evidence.¹²²

B. Factors in Assessing Admissibility

Although a defendant may assert a consent defense, this assertion does not automatically open the door to evidence of his prior sexual relationship with the complainant. Rather, a court must weigh the legitimate probative value of the evidence against the risk of unfair prejudice, embarrassment and harassment of the complainant, confusion of issues, and so forth.¹²³ Courts consider a variety of factors in exercising this discretion, including: witness credibility (discussed separately in part IX of this article),¹²⁴ the nature of the previous relationship, the length of time between the prior consensual sex and the alleged rape, the similarity between the prior conduct and the alleged assault, and the presence of physical evidence to corroborate the complainant's testimony that the sexual encounter giving rise to the charges was violent and forced rather than consensual. Many of these factors are legitimate, some are questionable. Inevitably, the weight a court gives each factor poses difficult questions of judgment.

1. Nature of the Prior Relationship

The nature of the prior relationship between complainant and defendant is especially important in assessing whether the relationship evidence

121. EDWARD O. LAUMANN, ET AL., *THE SOCIAL ORGANIZATION OF SEXUALITY, SEXUAL PRACTICES IN THE UNITED STATES 198-99* (1994) (hereinafter "SOS") (charting and discussing the increase in the average number of sex partners).

Nevertheless, women might still find it embarrassing to acknowledge to a dozen or so attentive strangers that she had consented to have sex with the defendant on occasions prior to the alleged rape. In fact, special circumstances may greatly increase the embarrassment or humiliation of public disclosure.

122. See, e.g., *Wood v. State*, 736 P.2d 363, 365 (Alaska Ct. App. 1987); see also *infra* note 293 (discussing the *Wood* case in greater detail); *State v. Lykken*, 484 N.W.2d 869, 874-75 (S.D. 1992) (the complainant testified that she and defendant had a prior consensual sexual relationship; the court held the trial judge properly precluded the defendant from introducing explicit photographs and tape recordings of their previous sexual encounters, and from testifying in unnecessarily explicit details about those encounters).

123. See discussion *supra* part I.B.3.

124. See discussion *infra* part IX.

is relevant on the issue of consent. Evidence that complainant and defendant were living and sleeping together at the time of the alleged rape,¹²⁵ or had shared an extended period of intermittent intimacy,¹²⁶ is far more relevant on the question of consent than evidence of a single casual sexual encounter.

Similarly, evidence that the complaining witness was pregnant with the defendant's child at the time of the alleged rape may suggest a more stable and consensual relationship than might a mere casual encounter.¹²⁷ Of course, it does not necessarily follow that a woman will be willing to have sex again with the man whose child she is carrying. But evidence that the complainant chose the defendant as the father of her child-to-be suggests a substantial attraction toward him that strongly supports his consent claim.

2. *Passage of Time*

The length of time between the prior consensual encounters and the alleged rape may be important in assessing the relevance and, therefore, the admissibility of the evidence concerning the prior encounter.¹²⁸ Some states create a statutory limitation beyond which evidence of prior consensual sex is inadmissible.¹²⁹ With or without a statutory provision, some courts have held that prior incidents not reasonably contemporaneous with the crime are inadmissible;¹³⁰ while other courts have admitted

125. This is not to suggest that a woman who lives with a man loses the right to say "no"; it only recognizes that her willingness to live and sleep with him is relevant in deciding whether she did or did not say "no" to him on the occasion in question.

126. *State v. Gonyaw*, 507 A.2d 944, 947 (Vt. 1985) (discussing evidence that the defendant and complainant lived together more than three years before the act complained of and engaged in consensual sex as recent as four days before the alleged rape); *see infra* note 132 and accompanying text.

127. *But see State v. Zuniga*, 703 P.2d 805, 810 (Kan. 1985) (stating that evidence that the victim was pregnant at the time of the alleged rape does not tend to show that the intercourse was consensual).

128. *United States v. Saunders*, 736 F. Supp. 698, 702 (E.D. Va. 1990) (quoting 124 CONG. REC. H11944 (1978)) (statement of Congressman Mann that the passage of time is a significant consideration).

129. *See, e.g., ALASKA STAT. § 12.45.045(b)* (1990) (indicating that "[i]n the absence of a persuasive showing to the contrary, evidence of the complaining witness' sexual conduct occurring more than one year before the date of the offense charged is presumed to be inadmissible").

MO. ANN. STAT. § 491.015(1) (Vernon Supp. 1994) (requiring that the prior act be "reasonably contemporaneous with the date of the alleged crime").

N.J. STAT. ANN. § 2C:14-7(b) (West Supp. 1994) (stating that "[i]n the absence of clear and convincing proof to the contrary, evidence of the victim's sexual conduct occurring more than one year before the date of the offense charged is presumed to be inadmissible").

130. *See Commonwealth v. Vieira*, 519 N.E.2d 1320 (Mass. 1988). The court held that

such evidence despite lengthy passage of time.¹³¹

An approach recognizing that time is only one of a totality of circumstances to be considered is preferable over a rigid limitation or an unyielding requirement that the prior incidents be reasonably contemporaneous. In a Vermont case, for example, the complainant conceded at the rape shield hearing that she and the defendant had lived together and were sexually intimate for three years and continued to be sexually intimate for another two years.¹³² The complainant denied the defendant's claim that she had consented to have sex with him four days before the alleged rape.¹³³ The trial court excluded all of this evidence; the state supreme court reversed, holding the trial court should have admitted it.¹³⁴ Assuming the consensual encounter prior to the alleged rape occurred, it is clearly relevant in determining whether the complainant consented four days later. Evidence of their prior relationship tends to corroborate the defendant's claim about the encounter four days earlier and, therefore, his version of the events that resulted in the rape charge.

3. *Similarity of Facts*

If the nature of the previous consensual relations between defendant and complainant differ significantly from those in the alleged rape, courts sometimes restrict the evidence that the defendant may offer relating to the prior conduct.¹³⁵

exclusion of the complainant's alleged statement to the defendant several months prior to the alleged rape, expressing interest in engaging in sex with the defendant and others for money, was proper. *Id.* at 1328. The statement was too remote in time and substance to give rise to a reasonable inference of consent. *Id.*

State v. Jones, 716 S.W.2d 799, 800-02 (Mo. 1986) (noting that conduct approximately three months prior to the alleged rape was inadmissible, particularly in view of medical testimony consistent with violent nonconsensual intercourse); State v. Boyd, 643 S.W.2d 825, 829-30 (Mo. Ct. App. 1982) (ruling that acts occurring earlier on the date of the alleged offense were admissible while acts occurring six months before that date were inadmissible).

State v. Lavalette, 578 A.2d 108, 109 (Vt. 1990) (excluding evidence of consensual sex 18 months prior to the alleged rape because it was not reasonably contemporaneous).

131. *Saunders*, 736 F. Supp. at 703 (holding sexual conduct that took place three years earlier was admissible as "having some probative value on the consent issue, but little, if any, risk of unfair prejudice"); *People v. Schuldt*, 577 N.E.2d 870, 876 (Ill. App. Ct. 1991) (finding two consensual episodes four years prior to the alleged rape probative on the issue of consent but excluding the details of these episodes as irrelevant); *Bixler v. Commonwealth*, 712 S.W.2d 366, 368 (Ky. Ct. App. 1986) (concluding that 18 months time was too long).

132. *State v. Gonyaw*, 507 A.2d 944, 946 (Vt. 1985).

133. *Id.*

134. *Id.* at 947.

135. *People v. Zysk*, 386 N.W.2d 213, 216 (Mich. Ct. App. 1986) (per curiam). The complainant alleged that the defendant forced her at knife point to submit to vaginal and

4. Allegations Involving Group Sex

Courts' emphasis on the similarity of the previous conduct and the charged conduct to determine its admissibility is particularly clear in cases involving allegations of multiple-participant rape. Generally, courts exclude evidence of prior consensual single-partner intercourse with the defendant if the evidence is offered to suggest that the complainant consented to group sex with the defendant and other men on the occasion in question. One court recognized:

There seems to be little, if any, logic to the proposition that because the complainant might have voluntarily consented to sexual intercourse with [one] defendant . . . in the past, in . . . an encounter between just the two of them, she would more probably have consented in this case to intercourse with not only [that] defendant . . . again, but also group intercourse with three other men in his company.¹³⁶

anal sex and inserted the knife handle into her vagina. *Id.* at 215. When arrested shortly thereafter, the defendant possessed a knife matching the one the complainant described. *Id.* At the rape shield hearing, the complainant acknowledged prior consensual oral sex and bondage episodes with defendant. *Id.* at 216. At trial the court allowed the defendant to testify and question the complainant about previous consensual vaginal and anal sex but held that prior episodes of oral sex and bondage "were distinct and unrelated to the brutal acts involved in the charged offense" and thus, "had no relevance to the issue of consent and were highly prejudicial." *Id.* at 217.

People v. Schuldt, 577 N.E.2d 870 (Ill. App. Ct. 1991). The complainant accused the defendant of binding, gagging and beating her and forcing her to submit to oral and anal sex; the defendant claimed that she asked to be bound and slapped and that he "became disgusted with the situation," cut her loose with a knife, and they engaged in consensual sexual relations. *Id.* at 873. At the rape shield hearing, the complainant acknowledged that she and the defendant previously engaged in vaginal sexual intercourse, but not anal intercourse; the defendant's offer of proof did not contradict this. *Id.* at 876. The appellate court held that it was proper to limit the defendant to eliciting testimony from the complainant that she had engaged in sexual intercourse with the defendant twice in the past four years and that the details of their previous sexual intimacy would be relevant only if the defendant could show that it had involved consensual sadomasochist sexual conduct similar to what the defendant claimed had occurred on the occasion of the alleged rape. *Id.* Absent such a showing, the details of their prior intimacy would unduly prejudice the complainant. *Id.*

136. *People v. Williams*, 330 N.W.2d 823, 827 (Mich. 1992); accord *People v. Hastings*, 390 N.E.2d 1273, 1277 (Ill. App. Ct. 1979) (ruling that evidence of previous consensual intercourse between the complainant and one defendant was inadmissible where the charged act involved several other defendants).

Ex rel. Nichols, 580 P.2d 1370, 1376 (Kan. Ct. App. 1978) (stating that the "defendant should not have presumed that [the complainant's] prior consensual activity with him alone would imply her consent to having intercourse with [him in the presence of] his friends [or with his friends]").

But see *Bixler*, 712 S.W.2d at 368-69 (holding that where the defense is one of consent, the court should have admitted evidence of a prior sexual relationship 18 months earlier between one defendant and the complainant on the issue of whether she consented to sex

Exclusion of this evidence is the proper result even where the complainant previously had engaged in intercourse separately with two of the defendants "in circumstances which could be described as less than discrete and private."¹³⁷

Where both the prior consensual encounter and the alleged rape involve multiple partners including one or more of the defendants, by contrast, the case for exclusion is not as clear.¹³⁸ On the one hand, such testimony allows the defendants to humiliate and embarrass the complainant to an extreme degree—possibly with perjured testimony which is easy to manufacture and difficult to disprove. On the other hand, the

with that defendant and his friend on the night in question). In reaching the conclusion, the court noted the lack of physical evidence corroborating the complainant's testimony, the two-week delay between the alleged crime and her report of it, and the complainant's testimony denying a prior sexual relationship with the defendant. *Id.*

137. *State v. Sheard*, 870 S.W.2d 212, 216 (Ark. 1994) (Newbern, J., dissenting). Ten teenage boys were charged with gang-raping one defendant's fifteen-year-old girlfriend. *Id.* at 213. At a pretrial hearing, defendants testified that the complainant had an ongoing sexual relationship with her boyfriend (D1); that the couple frequently had sex—always alone behind a closed door—while other defendants were in the house; that on several occasions, one or more defendants among D2, D3, D4 and D5 watched D1 and the complainant by peering through a gap between the door and the floor, that on one occasion D3, D4 and D5 "busted in" the room but left when told to do so; and that on another occasion a few months before the rape, the complainant had sex with D2 (also behind a closed door) the same day she had sex with D1. *Id.* In reversing the trial judge's order admitting the evidence, the state supreme court stated that, "whether a victim may have consented to prior normal, individual sexual relations with a defendant is simply not relevant to the situation alleged here, where the defendants assert [the complainant] consented to being restrained and subjected to sexual intercourse and conduct by multiple parties." *Id.* at 214.

Judge Newbern, dissenting, protested:

It seems clear to me that the evidence that this alleged victim had engaged in sexual intercourse with [D1] and others of the defendants in circumstances which could be described as less than discrete and private is relevant to the question whether she consented to the acts charged against these defendants. The Trial Court decided that the prejudicial nature of the evidence, which he so clearly recognized, was outweighed by its probative value. There is no clear right or wrong in such a decision, yet the majority . . . holds the Trial Court's decision was "clearly erroneous."

Id. at 216 (Newbern, J., dissenting).

Complainant's behavior was, as the dissent noted, "less than discrete and private." *Id.* at 216. Perhaps she derived an extra measure of excitement from the knowledge that D1's friends knew she and D1 were having sex. But to consider this indiscretion relevant as to whether a woman (let alone a fifteen-year-old girl) would suddenly consent to group sex with eight males is a staggering, logic-defying leap. The dissent is incorrect: there *is* a clear right or wrong in such a case. The majority was right.

138. It is worth noting that prior group sex with the defendant and others constitutes both "past sexual conduct with the accused," FED. R. EVID. 412(b)(2)(B), which may be admissible on the issue of consent, and also "past sexual behavior with persons other than the accused," FED. R. EVID. 412(b)(2)(A), which is generally excluded.

possibility that a woman would consent to have sex with two or more men at the same time strikes most people as bizarre, disgusting, and unlikely. In fact, a recent survey¹³⁹ found that “only 1% of women found group sex appealing.”¹⁴⁰ Thus, a jury may be inclined to view a consent defense with inherent disbelief. In this regard, evidence that the complainant previously consented to group sex with two or more men including one or more of the defendants does have legitimate probative value on the issue of consent, beyond the forbidden “yes/yes inference.”¹⁴¹ In any event, courts tend to admit such evidence.¹⁴²

139. See SOS, *supra* note 121. The survey, when released to the press, won wide praise as the most thorough, objective, representative and scientifically sound survey ever conducted of American sexual practices and attitudes. See, e.g., Tamar Lewin, *Sex in America: Faithfulness in Marriage Thrives After All*, N.Y. TIMES, Oct. 7, 1994, at A1; Editorial, *Sex, American Style*, N.Y. TIMES, Oct. 8, 1994, at 22; Barbara Vobejda, *Survey Finds Most Adults Sexually Staid; Americans' Average Is Once Per Week*, WASH. POST, Oct. 7, 1994, at A1. Within a few weeks, however, some critics found methodological flaws in the study that cast serious doubt on the validity of its findings. See, e.g., Charles C. Mann, *A More Perfect Union*, WASH. POST BOOK WORLD, October 30, 1994, at 8 (relating that the survey did not include people who spoke no English, nor people residing in college dormitories, military barracks or prisons). Moreover, according to the survey, men claimed a median of six sex partners since age 18, whereas women claimed a median of two; the survey did not find women with a large enough number of partners to account for the differential. Perhaps those women were too busy doing other things to respond to the survey; or perhaps, as even the authors of the survey speculated, men tend to overstate their sexual experience, while women tend to understate theirs. *Id.*

140. SOS, *supra* note 121, at 159. By contrast, 13% of men found the practice, or fantasizing about it, very appealing. The authors report that group sex was unpopular with all groups surveyed, and overwhelmingly so with women:

Race/gender	age	very appealing	somewhat	not	not at all
white men	18-44	14.8%	33.3%	20.7	31.3
white men	45-59	9.8%	18.9%	24.5%	46.8%
white women	18-44	0.9%	8.2%	14.0%	76.8%
white women	45-59	0.8%	4.2%	6.9%	88.1%
black men	18-44	14.3%	32.9%	13.7%	39.1%
black men	45-59	6.7%	8.9%	11.1%	73.3%
black women	18-44	1.6%	7.6%	16.0%	74.8%
black women	45-59	0.0%	4.5%	15.9%	79.5%

Id. at 162-65 Table 4.3.

141. Many scholars of this aspect of the law have expressed concern that to admit such evidence might render the complainant legally “unrapable”: if a jury believes a defendant’s evidence about the previous episode, it may conclude that the complainant is not worthy of the law’s protection and deserves whatever befalls her. See, e.g., Estrich, *supra* note 1, at 518-19 (noting that admitting evidence of a complainant’s psychiatric history may render her “unrapable, at least at a matter of law”). Although his admission that he participated in prior group sex episodes may also prompt the jury to think less of the defendant, the damage such evidence does to the complainant’s credibility produces a significant advantage to the defendant.

142. See *People v. Keith*, 173 Cal. Rptr. 704, 707 (Cal. Ct. App. 1981) (indicating that it was reversible error to exclude evidence that the complainant had engaged on three sepa-

5. Evidence of Violence

Where the prosecution offers substantial evidence, in addition to complainant's testimony, that the complainant was beaten or injured, a number of courts hold that evidence of prior consensual sex between the defendant and complainant should be limited¹⁴³ or excluded.¹⁴⁴ This result is appropriate: unless the defendant can offer a plausible explanation for the complainant's injuries, the legitimate probative value of prior consensual sex (unaccompanied by physical injury) to suggest consent on the occasion in question is virtually nonexistent.

6. Complainant's Prior, Unconsummated Sexual Interest in Defendant

Case law is mixed regarding the admissibility of evidence that the complainant previously indicated an interest in having sex with the defendant. Courts have held third-person testimony that the complainant expressed a desire to have sexual relations with the defendant was admissible as relevant on the issue of consent,¹⁴⁵ while excluding evidence that was

rate occasions in group sex with some, but not all, of the defendants in the alleged rape); *State v. Blalack*, 434 N.W.2d 55, 57 (S.D. 1988) (noting that evidence of previous "sex trios" involving defendant, the then complainant's husband from whom she had been divorced at the time of the alleged rape, and a third man, was properly admitted on the issue of complainant's consent to group sex with defendant and another man on the occasion in question).

But see *Joyce v. State*, 474 A.2d 1369 (Md. Ct. Spec. App. 1984). The complainant accused the defendant of restraining her to assist other men (who were neither defendants nor witnesses) in raping her; the defendant claimed she had consented to have intercourse with the others, and sought to elicit testimony from two witnesses that a few months before the alleged rape, she had consensually engaged in group sex with the witnesses, defendant, and a fourth man. *Id.* at 1373. The court held the evidence was properly excluded. The court distinguished *Keith*, *supra*, noting that in this case there was no common sexual partner in the two incidents. *Id.* at 1373-74. Similarly, see *People v. Goodwin*, 579 N.Y.S.2d 805 (N.Y. App. Div. 1992) (holding that it was not error to prohibit defense counsel from questioning the complainant about an alleged incident in which she engaged in oral sex with a third person while defendant was present, because the incident did not involve actual prior sexual conduct with the defendant).

As to whether a court should admit evidence of a woman's willingness to participate in group sex with one group of men to support the inference that she consented to do so with a completely different group of men, *see infra* part VII.A.

143. *People v. Zysk*, 386 N.W.2d 213, 216-17 (Mich. Ct. App. 1984); *see supra* note 135 (discussing the *Zysk* case in greater detail).

144. *McLean v. United States*, 377 A.2d 74, 77-78 (D.C. Cir. 1977); *State v. Iaukea*, 616 P.2d 219, 221 (Haw. 1980); *People v. Hastings*, 390 N.E.2d 1273, 1277-78 (Ill. App. Ct. 1979); *State v. Foulk*, 725 S.W.2d 56, 61-62 (Mo. Ct. App. 1987); *State v. Jones*, 716 S.W.2d 799, 801 (Mo. 1986); *Holloway v. State*, 695 S.W.2d 112, 117 (Tex. Ct. App. 1985), *aff'd*, 751 S.W.2d 866 (Tex. Crim. App. 1988).

145. *In re Johnson*, 573 N.E.2d 184, 188 (Ohio Ct. App. 1989) (holding this was not evidence of a sexual conduct within the purview of the rape shield law); *Massey v. Com-*

more suggestive of promiscuity than of desiring the defendant as an individual.¹⁴⁶ Each result seems consistent with the purposes underlying rape shield legislation. A Massachusetts court held that evidence of kissing and a risqué conversation with the defendant on a prior occasion was not probative as to whether the complainant consented on the occasion at issue.¹⁴⁷ This result is questionable: that a woman kissed and verbally flirted with a man on one occasion certainly does not mean she consented to sex on another occasion, but surely this evidence has some tendency to make her subsequent consent more probable than it would be without the evidence.

IV. BIAS; MOTIVE TO LIE

Often the greatest challenge a defendant will face is to present a plausible explanation as to why the complainant would accuse him falsely. Defendants frequently argue the complainant's prior sexual conduct¹⁴⁸ provides such a motive. These cases fall into four basic patterns.

(1) The defendant asserts the complainant consented to sex, then falsely claimed it was rape to persuade her husband or lover that she had not consented.¹⁴⁹

(2) The defendant asserts that the complainant consented to sex, then

monwealth, 337 S.E.2d 754, 758 (Va. 1985) (admitting witnesses' testimony concerning complainant's alleged sexual solicitation of defendant at a dance on the night of the alleged rape because it was relevant to complainant's consent and credibility); *accord* FED. R. EVID. 412 Advisory Committee Note (noting that "statements in which the alleged victim expressed an intent to engage in sexual intercourse with the accused, or voiced sexual fantasies involving the specific accused" are included within the exception for sexual "behavior" with the accused).

146. *Commonwealth v. Vieira*, 519 N.E.2d 1320, 1327-28 (Mass. 1988). The Supreme Judicial Court of Massachusetts upheld the trial judge's exclusion of a statement allegedly made by the rape complainant to the defendant two to three months prior to incident, expressing interest in engaging in sex with the defendant and others for money, because the statement was too remote in time and substance to give rise to a reasonable inference of consent. *Id.* at 1328.

147. *Commonwealth v. Fionda*, 599 N.E.2d 635, 639 (Mass. App. Ct. 1992).

148. Although motive and bias are most often cited in support of admitting evidence of the complainant's prior sexual behavior with others, sometimes the evidence involves prior sexual conduct with the defendant. *See, e.g., Commonwealth v. Stockhammer*, 570 N.E.2d 992 (Mass. 1991) (admitting evidence to show complainant was motivated by desire to avoid alienating her boyfriend) (*see infra* part IV.A.1.); *Commonwealth v. Taylor*, 487 A.2d 946 (Pa. Super. Ct. 1985) (reversing trial court's exclusion of evidence of past consensual sexual relation between complainant and defendant) (*see infra* part IV.A.4.); *Garza Barraza v. State*, 739 S.W.2d 368 (Tex. Ct. App.), *rev'd on recons.*, 760 S.W.2d 1 (Tex. Ct. App. 1987) (excluding evidence of complainant's motive to prevent exposure of prior sexual acts with others) (*see infra* part IV.A.3.).

149. *See infra* part IV.A.1.

falsely claimed it was rape to avoid being charged with prostitution.¹⁵⁰

(3) The defendant denies engaging in sexual behavior with the complainant and claims she falsely accused him of rape to hide the fact that she was having consensual sex with someone else.¹⁵¹

(4) The defendant offers evidence of the complainant's prior sexual conduct to bolster a defense that she fabricated charges against him to avenge some real or imagined slight.¹⁵²

A defendant's assertion of motive or bias should not automatically strip the complainant of the protection of rape shield legislation. If the evidence is of insufficient probative value, it should be excluded.¹⁵³ The Supreme Court has made it clear, however, that as a general rule, "cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand . . . is a proper and important function" of the Sixth Amendment rights to confront one's accusers and to present a defense.¹⁵⁴ These rights guarantee, not merely the opportunity "to ask [a witness] *whether* [s]he is biased," but also the right "to make a record from which to argue *why* [she] might have been biased" or motivated to testify falsely.¹⁵⁵

Thus, rape shield legislation must, in appropriate circumstances, yield

150. See *infra* part IV.A.2.

151. See *infra* part IV.A.3.

152. See *infra* part IV.A.4.

153. Hall v. State, 500 So. 2d 1282, 1286 (Ala. Crim. App. 1986).

Wright v. State, 513 A.2d 1310, 1314 (Del. 1986).

People v. Sandoval, 552 N.E.2d 726, 737 (Ill.), *cert. denied*, 498 U.S. 938 (1990) (dictum); People v. Vaughn, 371 N.E.2d 1248, 1251 (Ill. App. Ct. 1978).

Commonwealth v. Domaingue, 493 N.E.2d 841, 845 (Mass. 1986); Commonwealth v. Elder, 452 N.E.2d 1104, 1110 (Mass. 1983).

White v. State, 598 A.2d 187, 193 (Md. 1991).

People v. Hackett, 365 N.W.2d 120, 124-25 (Mich. 1984) (dictum).

People v. Halbert, 572 N.Y.S.2d 331, 332 (N.Y. App. Div. 1991), *aff'd*, 587 N.Y.S.2d 891 (N.Y. 1992); People v. Laundry, 504 N.Y.S.2d 840, 842 (N.Y. App. Div. 1986).

State v. Morrison, 351 S.E.2d 810, 813 (N.C. Ct. App.), *cert. denied*, 354 S.E.2d 724 (N.C. 1987).

State v. Bennett, 637 P.2d 208, 209-10 (Or. Ct. App. 1981).

State v. Lovato, 702 P.2d 101, 105 (Utah 1985).

State v. Bevins, 439 A.2d 271, 272-73 (Vt. 1981).

154. Davis v. Alaska, 415 U.S. 308, 316 (1974). Bias may include a witness' self-interest or his favor, fear or dislike of another party or witness "which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party." United States v. Abel, 469 U.S. 45, 52 (1984).

155. Davis, 415 U.S. at 318. A defendant must be given the opportunity "to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." *Id.*

to a defendant's right to offer probative evidence of bias or motive to lie.¹⁵⁶ Several state statutes explicitly recognize this constitutional requirement by including bias among the valid purposes for which evidence of the complainant's prior sexual conduct may be offered.¹⁵⁷ Furthermore, courts generally acknowledge that, with or without such a provision, admission of such evidence often is constitutionally required.¹⁵⁸

156. *Id.* at 319-20. In *Davis*, the Supreme Court held that this right takes precedence even over a statute, intended to safeguard a witness from stigma and embarrassment, protecting the confidentiality of juvenile delinquency adjudications. *Id.* at 319. A government witness identified Davis as the person he saw possessing stolen property. *Id.* at 310. Davis sought to show that the witness might have been motivated to testify falsely out of fear that otherwise the police might suspect the witness of involvement. *Id.* at 311. To support this inference, defense counsel sought to elicit on cross-examination that the witness was then on probation for a juvenile court adjudication for burglary. *Id.* The trial court, relying upon a state law protecting the confidentiality of such adjudications, refused to permit it. *Id.* The Supreme Court held that the Confrontation Clause entitled defense counsel to confront the witness with this information despite the state statute. *Id.* The parallels between the statute in *Davis* and rape shield legislation are obvious.

157. MD. ANN. CODE art. 27, § 461A(a)(3) (1992) (excepts from the rule of inadmissibility "[e]vidence which supports a claim that the victim has an ulterior motive in accusing the defendant of the crime . . .").

OR. R. EVID. 412(2)(b)(A) (excepts from exclusion evidence that "[r]elates to the motive or bias of the alleged victim . . .").

TEX. R. CRIM. EVID. 412(b)(2)(C) (provides likewise).

VA. CODE ANN. § 18.2-67.7(B) (Michie 1988) provides:

B. Nothing contained in this section shall prohibit the accused from presenting evidence relevant to show that the complaining witness had a motive to fabricate the charge against the accused. If such evidence relates to the past sexual conduct of the complaining witness with a person other than the accused, it shall not be admitted and may not be referred to at any preliminary hearing or trial unless the party offering [the] same files a written notice generally describing the evidence prior to the introduction of any evidence, or the opening statement of either counsel, whichever first occurs, at the preliminary hearing or trial at which the admission of the evidence may be sought.

Id.

158. *Daniels v. State*, 767 P.2d 1163, 1166-67 (Alaska Ct. App. 1989).

Lewis v. State, 591 So. 2d 922, 925 (Fla. 1991); *Castro v. State*, 591 So. 2d 1076, 1076-77 (Fla. Dist. Ct. App. 1991).

People v. Vaughn, 371 N.E.2d 1248, 1250-51 (Ill. App. Ct. 1978).

Lewis v. State, 440 N.E.2d 1125, 1128-29 (Ind. 1982), *cert. denied*, 461 U.S. 915 (1983).

State v. Vaughn, 448 So. 2d 1260, 1262 (La. 1983).

State v. DeLawder, 344 A.2d 446, 449 (Md. Ct. Spec. App. 1975).

Commonwealth v. Stockhammer, 570 N.E.2d 992, 998-99 (Mass. 1991); *Commonwealth v. Joyce*, 415 N.E.2d 181, 186-87 (Mass. 1981); *Commonwealth v. Fetzner*, 476 N.E.2d 981, 982-83 (Mass. App. Ct. 1985).

People v. Hackett, 365 N.W.2d 120, 124-25 (Mich. 1984).

State v. Hagen, 391 N.W.2d 888, 892 (Minn. Ct. App. 1986).

State v. Madsen, 772 S.W.2d 656, 658-59 (Mo. 1989), *cert. denied*, 493 U.S. 1046 (1990).

People v. Mandel, 403 N.Y.S.2d 63, 66 (N.Y. App. Div. 1978), *rev'd*, 425 N.Y.S.2d 63 (N.Y. 1979).

State v. Wattenbarger, 776 P.2d 1292, 1294 (Or. Ct. App. 1989); *State v. Bennett*, 637

A. Relevance

1. To Deny Infidelity

In a substantial number of cases, the defendant concedes he had intercourse with the complainant, insists it was consensual, and alleges the complainant falsely accused him of rape to prevent her husband or lover from learning that she had been unfaithful. In *Olden v. Kentucky*,¹⁵⁹ the defendant, an African-American, was convicted of sexually assaulting a Caucasian woman named Matthews.¹⁶⁰ Matthews testified that after the assault, the defendant and a friend drove her to the vicinity of the home of another African-American named Russell.¹⁶¹ Russell circumstantially corroborated Matthews by testifying he heard a noise, saw Matthews get out of the defendant's friend's car, and that Matthews immediately told him she had been raped by the defendant and his friend.¹⁶² The defendant asserted the defense of consent.¹⁶³

At the time of the alleged rape, Matthews and Russell, although married to and living with other people, apparently were involved in an extra-marital relationship and by the time of trial, were living together.¹⁶⁴ The defendant maintained that Matthews concocted the rape story to protect her relationship with Russell, who otherwise would have grown suspicious upon seeing her disembark from the friend's car.¹⁶⁵ To demonstrate Matthews' motive to lie, the defendant sought to introduce evidence that Matthews and Russell were cohabiting, but the trial court granted the

P.2d 208, 209-10 (Or. Ct. App. 1981).

Commonwealth v. Wall, 606 A.2d 449, 457-63 (Pa. Super. Ct. 1992); Commonwealth v. Poindexter, 539 A.2d 1341, 1343-44 (Pa. Super. Ct. 1988).

State v. Finley, 387 S.E.2d 88, 90 (S.C. 1989).

Garza Barreda v. State, 739 S.W.2d 368, 370 (Tex. Ct. App.), *rev'd on recons.*, 760 S.W.2d 1 (Tex. Ct. App. 1987).

State v. Bevins, 439 A.2d 271, 272 (Vt. 1981).

Winfield v. Commonwealth, 301 S.E.2d 15, 21 (Va. 1983).

State v. Hudlow, 659 P.2d 514, 520 (Wash. 1983) (dictum); State v. Roberts, 611 P.2d 1297, 1300-01 (Wash. Ct. App. 1980).

State v. Herndon, 426 N.W.2d 347, 362-63 (Wis. Ct. App. 1988).

See also Berger, *supra* note 6, at 98-99 (setting forth a model rape shield statute); Tanford & Bocchino, *supra* note 8, at 591-602 (comparing 46 rape shield state statutes).

159. 488 U.S. 227 (1988) (per curiam).

160. *Id.* at 228.

161. *Id.*

162. *Id.* at 229. Defendant and the friend were originally indicted for kidnapping and raping the complainant. *Id.* at 230. In what the Court called a "somewhat puzzling turn of events," the friend was acquitted of all charges and defendant was convicted only of forcible sodomy. *Id.*

163. *Id.* at 230.

164. *Id.* at 229-30.

165. *Id.* at 230.

prosecutor's motion *in limine* to keep all evidence of Matthews and Russell's living arrangement from the jury.¹⁶⁶ A state appellate court affirmed, reasoning that although evidence of Matthews and Russell's cohabitation at the time of trial was not barred by the state's rape shield law, the court properly excluded it because " 'Matthews was white and Russell was black,' " and testimony that they were living together at the time of the trial " 'may have created extreme prejudice against Matthews.' " ¹⁶⁷

A nearly unanimous¹⁶⁸ Supreme Court reversed:

"[T]he exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." . . . "[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness'."

In the instant case, petitioner has consistently asserted that he and Matthews engaged in consensual sexual acts and that Matthews—out of fear of jeopardizing her relationship with Russell—lied when she told Russell she had been raped and has continued to lie since. It is plain to us that "[a] reasonable jury might have received a significantly different impression of [the witness'] credibility had [defense counsel] been permitted to pursue his proposed line of cross-examination."¹⁶⁹

Although *Olden* is not a rape shield case per se (the "prejudice" against which the trial court sought to protect the complainant stemmed from her relationship's biracial nature, rather than its sexual nature), if the state court had excluded the evidence on rape shield grounds, it is doubtless the Supreme Court would have reached the same result for the same reasons. A number of courts, employing similar reasoning, hold that evidence of a complainant's sexual relationship with another man must be admitted where the evidence is relevant to suggest a motive to

166. *Id.* Even after Matthews claimed during direct examination that she was living with her mother, the trial court refused to allow the defense to cross-examine Matthews about her living arrangements. *Id.*

167. *Id.* at 231 (quoting the unpublished opinion of the Kentucky Court of Appeals).

168. Justice Marshall dissented because the Court disposed of the case summarily without first hearing oral argument. *Id.* at 233.

169. *Id.* at 231-32 (quoting and citing *Davis v. Alaska*, 415 U.S. 308, 316-17 (1974)); *Greene v. McElroy*, 360 U.S. 474, 496 (1959); *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986)).

falsely accuse the defendant of rape.¹⁷⁰

Several state courts, however, have excluded similar evidence in circumstances not easily distinguishable from those in *Olden*.¹⁷¹ *Commonwealth v. Berkowitz*,¹⁷² a decision by the Pennsylvania Supreme Court, provides a particularly troubling example. The defendant, a college student, asserted that his accuser had consented to intercourse, but then charged rape because she feared her boyfriend's jealousy.¹⁷³ To support this defense, the defendant sought to introduce evidence that the complainant's boyfriend previously had accused her of infidelity.¹⁷⁴ Although the trial court allowed defense counsel to offer evidence that the couple had argued frequently, it held that the state rape shield statute banned testimony about the cause or content of the arguments.¹⁷⁵ Despite the defendant's argument on appeal that he was not seeking to prove the complainant actually had been unfaithful to her boyfriend, but only to show they had argued about whether she had been unfaithful, the state supreme court affirmed the trial court's ruling.¹⁷⁶ The court noted that "the rape shield law does not recognize such a distinction. . . . [T]he allegation that the victim and her boyfriend had argued over the issue of her infidelity is so closely tied to the issue of the victim's fidelity itself that,

170. *Commonwealth v. Fetzer*, 476 N.E.2d 981, 982-83 (Mass. App. Ct. 1985) (concluding that the trial court should have permitted inquiry into the existence of a romantic relationship between complainant and another as the foundation of defendant's argument that complainant had a motive to lie concerning whether she consented to sexual activity with defendant).

Similarly, see *Commonwealth v. Stockhammer*, 570 N.E.2d 992, 997 (Mass. 1991). The court implicitly approved the trial court's decision to allow defense counsel to elicit testimony that the complainant had maintained a sexual relationship with her boyfriend prior to the alleged rape. The testimony would be used to show the complainant had a motive to accuse the defendant falsely of rape to avoid alienating her boyfriend.

State v. Hagen, 391 N.W.2d 888 (Minn. Ct. App. 1986). The trial court refused to admit results of two secreteor semen tests which indicated that defendant was most probably not the source of semen collected from complainant; excluded statements she made inconsistent with her testimony regarding her last date of intercourse; and precluded defendant from cross-examining complainant about other sexual behavior during the two or so hours between her husband's early morning departure and her report of rape. *Id.* at 890-91. The appellate court held this was reversible error. *Id.* at 893. The excluded evidence could support the inference that the complainant had engaged in consensual extramarital intercourse with someone other than her husband and defendant, and would be relevant to a potential motive to fabricate a rape charge. *Id.* at 892.

171. See *infra* notes 182-86.

172. 641 A.2d 1161 (Pa. 1994).

173. *Id.* at 1165.

174. *Id.*

175. *Id.*

176. *Id.* An intermediate appellate court had reversed defendant's conviction; the state supreme court reversed the reversal. *Id.* at 1166.

for the purposes of the Rape Shield Law, they are one and the same."¹⁷⁷

The court was wrong, both in its explicit minor premise and in its implicit major premise. First, whether the complainant's boyfriend had accused her of being unfaithful and whether she had been unfaithful are not "one and the same." Rather, they are significantly different. Cross-examination of the complainant about the accusations would be much more limited, and therefore less of an ordeal to the complainant, than cross-examination about the underlying question of fidelity.¹⁷⁸ The same is true of extrinsic evidence on the question.¹⁷⁹ Procedures exist to minimize the impact on the complainant¹⁸⁰ and to assure the jury will understand what they should and should not do with the evidence.¹⁸¹

More disturbing, however, is the fact that the Pennsylvania Supreme

177. *Id.* at 1165. The court held, however, that defendant's rape conviction could not stand because, although complainant testified that she repeatedly told defendant "no," the defendant had not used force to compel the complainant to submit. *Id.* at 1164-65. This aspect of the decision was harshly criticized. See, e.g., Dale Russakoff, *Where Women Can't Just Say 'No'; Pennsylvania Supreme Court Rules Force is Needed to Prove Rape*, WASH. POST, June 3, 1994, at A1 (noting criticisms of the *Commonwealth v. Berkowitz* decision); Robert Moran and Emilie Lounsberry, *Revisions Sought in Rape Law*, PHIL. INQUIRER, June 7, 1994, at B1 (discussing *Commonwealth v. Berkowitz*).

178. Compare, for example,

(1) Q: Isn't it true that you cheated on your boyfriend several times by having sex with other men? (With A, and with B, and with C")

Q: Isn't it true that he found out about your infidelity and threatened to dump you if you didn't stop? with

(2) Q: Isn't it true that your boyfriend had accused you in the past of being unfaithful to him, and threatened to dump you if you didn't stop?

To be subjected to either cross-examination would of course be unpleasant, but the first would be far more offensive.

179. Extrinsic proof that the complainant's boyfriend had accused her would be limited to questioning her boyfriend ("Did you accuse her") and, perhaps, testimony of witnesses who overheard them arguing. Evidence of actual infidelity—testimony by other men that they had sex with the complainant or saw her having sex with other men, testimony by witnesses that complainant had told them about her sexual behavior with other men, etc.—would be far more embarrassing to her, distracting to the jury, and prejudicial to the State.

180. The judge could have admonished defense counsel and defense witnesses that questioning and testimony must relate only to whether the boyfriend accused the complainant of infidelity, not whether the accusation might have been true. In addition, while allowing testimony as to the frequency and vehemence of the arguments, the judge could have precluded testimony about the specific details of the accusations. And, if it was apparent that the boyfriend's accusations were unjust, the judge could allow the complainant to testify that she had not in fact been unfaithful.

181. If we cannot trust juries to understand that the making of an accusation is not proof that the accusation is true, how can we trust juries to decide whether the defendant is guilty of the crime he is accused of committing? Moreover, the judge could instruct the jury as to the limited purpose evidence of the accusations was being admitted. See, e.g., 2 C. FISHMAN, JONES ON EVIDENCE §§ 11:27, 11:30 (7th ed. 1994); FED. R. EVID. 105 (concerning limited admissibility of evidence).

Court failed to acknowledge a defendant's right to offer evidence, despite the rape shield statute, that strongly suggests the complainant had a motive to accuse the defendant falsely. The defendant was not merely attempting to bolster a "tenuous"¹⁸² or "speculative"¹⁸³ argument that the complainant had a motive to lie; he had hard evidence of the complainant's concern about her boyfriend's jealousy and suspicions.¹⁸⁴ The state supreme court apparently did not consider this even worth mentioning.

Several other courts also have excluded evidence under similar circumstances.¹⁸⁵ Although each case must be considered on its facts, some of these decisions, too, are questionable.¹⁸⁶ The desire to prevent one's

182. *State v. Madsen*, 772 S.W.2d 656, 661 (Mo. 1989), *cert. denied*, 493 U.S. 1046 (1990) (disallowing cross-examination which could only produce a "tenuous" inference); *see infra* note 185.

183. *People v. Laundry*, 504 N.Y.S.2d 840, 842 (N.Y. App. Div. 1986) (upholding exclusion where the premise of the evidence was too "speculative" to show motive to lie); *see infra* note 185.

184. *Commonwealth v. Berkowitz*, 641 A.2d 1161, 1165 (Pa. 1994).

185. *Hall v. State*, 500 So. 2d 1282, 1286-87 (Ala. Ct. App. 1986). Evidence that complainant had sex with her boyfriend shortly before the alleged rape was not admissible to show complainant's motive to deny that intercourse with the defendant had been consensual or to show her need to fabricate an excuse for returning home late. *Id.*

Madsen, 772 S.W.2d at 661. Defense counsel sought to bring out on cross-examination that the complainant was living with "S." and had regular sexual relations with him, arguing that her relationship with S. gave her a motive for making false claims of rape when she appeared in their shared room during the early morning hours following the incident. *Id.* at 658. "S. arguably would ask where she had been and would not be pleased if she admitted having been picked up at a pool hall." *Id.* at 661. The court categorized this inference as "tenuous" at best, because no one had testified that S. demanded an explanation; rather, "the testimony shows . . . that S. was sleeping soundly and was stirred to waking only with some difficulty after she told him that she had been raped . . . [t]here is no indication that she parried a demand for accounting with a false accusation of rape." *Id.* Balancing this "attenuated" inference against the policy underlying the rape shield statute, the court held that the trial court acted within its discretion to exclude the evidence. *Id.*

Laundry, 504 N.Y.S.2d at 842. The cross-examination of a sodomy complainant concerning her prior sexual relationship with her boyfriend was properly excluded where such testimony was offered to demonstrate that her boyfriend disbelieved her story and that the incident was fabricated to gain her boyfriend's sympathy. *Id.* The boyfriend testified that he never told the complainant that he disbelieved her story; hence, the defense thesis that the complainant lied about the entire episode was clearly speculative. *Id.*

See also *White v. State*, 598 A.2d 187, 189-93 (Md. 1991) (discussed in greater detail, *infra* notes 220-23 and accompanying text).

186. Each of the cases cited in the previous note rejected as "tenuous" or "speculative" the very inference that the Supreme Court in *Olden* found to be compelling, and under similar circumstances. *Madsen*, 772 S.W.2d at 661; *Laundry*, 504 N.Y.S.2d at 842. *But see Olden v. Kentucky*, 488 U.S. 266 (1988). As in *Madsen*, *Laundry*, and *White*, the defendant offered no evidence that the complainant's lover demanded an explanation or disbelieved her story. *Id.* at 228-31. Nevertheless the Court in *Olden* held that the very nature of the relationship gave the defendant a basis to argue to the jury, either that the complainant's lover may have demanded an explanation, or that the complainant fabricated a rape charge to beat her lover to the punch. *Id.* at 230.

lover from suspecting infidelity is, as the Court said in *Olden*, a “prototypical form of bias”; to prevent a defendant from attempting to offer evidence “. . . from which jurors . . . could appropriately draw inferences. . .” of such bias constitutes a violation of the Confrontation Clause.¹⁸⁷

2. To Avoid Prosecution for Prostitution

Many states generally exclude evidence that the complainant is a prostitute.¹⁸⁸ However, evidence of prior arrests or convictions for prostitution can be highly relevant circumstantial corroboration where the defendant insists that the complainant consented but then alleged rape to avoid a prostitution arrest.¹⁸⁹

3. To Protect Reputation for Chastity

Some defendants have also argued, with mixed results, that evidence of other sexual conduct would help establish that a complainant’s sexual assault allegation was motivated by a desire to protect her reputation for

Several factors present in *Olden*, however, may have made admitting the evidence in that case more imperative than in other cases. *Olden* presented an apparently strong defense, calling several witnesses who directly or circumstantially corroborated his claim that Matthews willingly accompanied defendant and his friend. *Id.* at 229. Moreover, Matthews and Russell both testified that Russell saw her get out of the defendant’s friend’s car, which, according to defendant’s theory, made it imperative for Matthews to allege rape immediately. *Id.* at 230. And Matthews lied on direct examination about her living arrangements at the time of the trial. *Id.* These factors appear to be missing from the cases cited *supra* note 185. Also missing, however, even in the those cases decided after *Olden*, is a serious discussion of the importance of permitting a defense counsel to offer evidence, or ask questions, which would support a defendant’s argument of motive to lie to the jury.

187. *Olden*, 488 U.S. at 231-32 (quoting *Davis v. Alaska*, 475 U.S. 308, 318 (1974)).

188. See *infra* notes 349-60 and accompanying text.

189. *Commonwealth v. Joyce*, 415 N.E.2d 181, 187 (Mass. 1981). The defendant had the right to show that the complainant had been charged with prostitution twice in the previous eight months after being found naked in a car with men, to support his claim that her accusation of rape after being found by police in a similar situation with defendant was motivated by a desire to avoid being charged a third time; see also *State v. Herndon*, 426 N.W.2d 347, 362-63 (Wis. Ct. App. 1988) (holding that a defendant has a Sixth Amendment right to inquire into complainant’s prior arrests for prostitution in the area of the alleged rape as evidence of complainant’s bias and willingness to fabricate a rape allegation).

fidelity or chastity with her parents,¹⁹⁰ members of her church,¹⁹¹ and neighbors;¹⁹² to explain a pregnancy,¹⁹³ or to obtain an abortion.¹⁹⁴

190. *Lewis v. State*, 591 So. 2d 922 (Fla. 1991). The defendant, accused of sexual activity with a child under 18 while in a position of familial or custodial authority, contended that the complainant fabricated the charges to hide her sexual relationship with her boyfriend from her mother. *Id.* at 923. The court held that exclusion of her sexual history violated defendant's constitutional right to confront his accuser and develop his defense through reasonable cross-examination. *Id.* at 926.

State v. DeLawder, 344 A.2d 446 (Md. Ct. Spec. App. 1975). The court held that the defendant's right of confrontation required the admission of evidence supporting the defense theory that the complainant accused the defendant of rape because she was afraid to tell her mother that she had engaged in sexual intercourse with certain men other than the accused and was pregnant. *Id.* at 455.

Commonwealth v. Stockhammer, 570 N.E.2d 992 (Mass. 1991). The complainant accused a fellow college student, with whom she had been best friends, of rape several months after the incident in question. *Id.* at 995. The defendant claimed that the complainant had consented, and that she charged him with rape only after her father, who adamantly opposed premarital sex, learned of the incident. *Id.* at 998. The trial judge permitted the defendant to elicit evidence of the complainant's prior sexual relationship with her boyfriend, but prevented defense counsel from asking her on cross-examination whether her parents had known, prior to her rape accusation, that she was sexually active with that boyfriend. The court held that this was highly relevant to complainant's bias and motive to lie and should have been allowed. *Id.* at 1000.

State v. Roberts, 611 P.2d 1297 (Wash. Ct. App. 1980). The complainant and two friends who had been present at the scene testified that three initial statements made by them to the police were untrue. *Id.* at 1301. The court held that the failure to permit the defendant to pursue on cross-examination a theory that the complainant's testimony was motivated by a parental compulsion to cooperate with the prosecutor constituted denial of the defendant's right to effective cross-examination. *Id.*

191. *Garza Barrera v. State*, 739 S.W.2d 368 (Tex. Ct. App.), *rev'd on recons.*, 760 S.W.2d 1 (Tex. Ct. App. 1987). Evidence of the complainant's past sexual conduct with the defendant was admissible to show that her accusation of rape was motivated by fear that if others learned of the relationship, it would affect her church membership. Testimony, however, regarding her sexual conduct with third parties offered for a similar purpose, the court held, properly was excluded as irrelevant and highly prejudicial. *Id.* at 369-70.

192. *State v. Finley*, 387 S.E.2d 88 (S.C. 1989). After an evening of dinner, watching television and drinking tequila in the complainant's living room, the complainant and defendant fell asleep; she on a love seat, he on the floor in the same room. *Id.* at 89. The complainant alleged that the defendant attempted to rape her after they both woke up the following morning. *Id.* The defendant denied any attempt at sexual conduct, and claimed that at approximately 2:30 that morning he woke up and saw a male from a neighboring apartment having sex with the complainant on the love seat. *Id.* After the neighbor left, the defendant and complainant fell asleep without conversing. Later in the morning they argued about her sexual activity with the neighbor. *Id.* The court held that it was error to exclude this evidence, which supported the defendant's theory that the complainant fabricated the charges against him for fear he would tell others about her behavior with the neighbor. *Id.* at 90.

193. *Wright v. State*, 513 A.2d 1310, 1313-15 (Del. 1986) (holding that the evidence was properly rejected because if the complainant's motive had been to invent an excuse in case she became pregnant, she would have had no reason to report that the defendant also forced her to engage in oral sex). See *supra* note 190 (discussing *DeLawder*).

194. *State v. Lovato*, 702 P.2d 101 (Utah 1985). Evidence that the complainant had

4. Vengeance or Spite

Another commonly asserted defense in sexual assault cases is that the complainant fabricated the charge out of vengeance or spite.¹⁹⁵ In cases involving adult complainants, the defense typically alleges that the complainant is trying to get back at the defendant, or someone close to the defendant, for embarrassing or humiliating her. In light of *Olden*,¹⁹⁶ the amount of discretion a court has to exclude such evidence is unclear, even if the evidence reveals information or contains allegations about the complainant's prior sexual conduct.¹⁹⁷ To reject a defendant's proffer because it is not logical for the complainant to have acted as defendant claims¹⁹⁸ does not sufficiently acknowledge that those who feel spurned

engaged in sexual intercourse two days before the alleged rape was held not admissible to show that she had lured the defendant into consensual intercourse and then fabricated the rape charge to obtain, from a rape crisis volunteer, medication that would cause an abortion. *Id.* at 105.

195. Some decisions have admitted such evidence. See *DeLawder*, 344 A.2d at 455 (discussed *supra* note 190); *State v. Hagen*, 391 N.W.2d 888, 892 (Minn. Ct. App. 1986); *State v. Colbath*, 540 A.2d 1212, 1217 (N.H. 1988) (discussed *infra* part VI.D.); *Finley*, 387 S.E.2d at 89-90 (discussed *supra* note 192).

Other cases have excluded such evidence. See *Stephens v. Miller*, 13 F.3d 998, 1003 (7th Cir.), *cert. denied*, 115 S. Ct. 57 (1994) (discussed *infra* notes 202-12); *State v. Bennett*, 637 P.2d 208, 210 (Or. Ct. App. 1981) (discussed *infra* note 201 and accompanying text); *Marr v. State*, 494 So. 2d 1139, 1143 (Fla. 1986); *supra* notes 148-52 and accompanying text (relating to other evidence of bias).

196. *Olden v. Kentucky*, 488 U.S. 227 (1988). See *supra* notes 159-69 and accompanying text.

197. *People v. Mandel*, 403 N.Y.S.2d 63 (N.Y. App. Div. 1978), *rev'd*, 425 N.Y.S.2d 63 (N.Y. 1979), *and cert. denied*, 446 U.S. 949 (1980). The appellate court concluded that evidence that the complainant had refused to allow anyone to touch her breasts while engaging in sexual intercourse should have been admitted because under the particular circumstances of the case such evidence went to the very core of the defense. The defendants sought to prove that the complainant charged the defendants with rape because she was humiliated and embarrassed when water balloons fell out of her brassiere and burst upon the floor, prompting the defendants to laugh. *Id.* at 71.

Commonwealth v. Taylor, 487 A.2d 946, 947 (Pa. Super. Ct. 1985) (per curiam) (holding that the trial court should have admitted evidence of past consensual sexual conduct between the complainant and defendant, which, when coupled with the defendant's claimed reluctance to spend time with her on the night of alleged rape, supported a defense of bias leading to fabrication of charges).

198. Consider, for example, *State v. Bevins*, 439 A.2d 271 (Vt. 1981). The defendant sought to offer evidence that the complainant unsuccessfully tried to induce his brother-in-law to have sexual intercourse with sexually provocative conduct. *Id.* at 272. His theory: furious at being spurned, she consented to have sex with the defendant, then falsely accused the defendant of rape to get back at the defendant's brother-in-law. *Id.* The Vermont Supreme Court held that the trial judge properly excluded the evidence. *Id.* at 273. The court stated:

It defies belief that a woman who has been publicly scorned and humiliated would retaliate by subsequently consenting to sexual intercourse with a third person, and then falsely accusing that person of rape. It makes absolutely no sense

in matters relating to love and sex sometimes react irrationally and vindictively.¹⁹⁹ This reaction, similar to the situation in *Olden*, is a "prototypical form of bias."²⁰⁰ It is clearly proper, however, to reject evidence where the defendant's offer of proof is speculative and unsubstantiated.²⁰¹

The Seventh Circuit, sitting en banc, divided sharply on motive-to-lie evidence in its 1994 decision, *Stephens v. Miller*.²⁰² To explain why the complainant would accuse him of rape after allegedly consenting to inter-

for the prosecuting witness to avenge herself against one person by claiming another person raped her. Evidence without probative value is irrelevant. The evidence was for this reason inadmissible as to motive.

Id. at 272-73.

Similarly, see *Commonwealth v. Reed*, 644 A.2d 1223 (Pa. Super. Ct. 1994). The defendant was accused of indecent assault on his son's fourteen-year-old ex-girlfriend. *Id.* at 1224. The defendant argued that he should be convicted of only corrupting a minor because she consented. The defendant sought to testify that, while he was driving her home, she discussed intimate details of her prior sexual relationship with his son, and told him that she had been expelled from school for threatening to kill his son's current girlfriend. *Id.* at 1227. The court held that it was not error to exclude this evidence. "Any suspicion that L.R.'s hostility toward her ex-boyfriend's new relationship would 'spill-over' toward Reed is entirely speculative and properly excluded." *Id.* at 1228 n.4. Although the defendant's behavior was despicable in any event, the result is questionable, particularly given other evidence of the complainant's mental and emotional instability: it is quite plausible that a fourteen-year-old who is unstable enough to threaten her ex-boyfriend's new girlfriend with a knife might also decide to get back at the ex-boyfriend by having sex with his father and then accusing him of rape.

199. "Heaven has no rage like love to hatred turned,/ Nor hell a fury like a woman scorned." WILLIAM CONGREVE, *THE MOURNING BRIDE*, act III, sc. viii (1697)—except, sometimes, a man scorned.

200. *Olden*, 488 U.S. at 231 (1988) (quoting *Davis v. Alaska*, 475 U.S. 308 (1975)) (discussed extensively *supra* note 186).

201. See, e.g., *State v. Besk*, 640 A.2d 775, 777 (N.H. 1994). Prior to defendant's trial for molesting two boys under the age of thirteen, the state sought to exclude evidence that one of the complainants had molested the defendant's younger son. *Id.* at 776. Objecting, the defense counsel argued, "[T]his boy has molested my client's son and was caught, and was caught perhaps with the help of my client and perhaps now he holds a grudge against my client." *Id.* Affirming the trial court's exclusion of the evidence, the state supreme court held that the defendant had failed to establish a sufficient nexus between the alleged incident and the complainant's motivation to lie. *Id.* at 777. The court noted that the defendant's offer of proof was "tentative and speculative," and offered no proof that the defendant in fact played a part in the complainant's apprehension or that complainant knew of defendant's role in the matter. *Id.*

State v. Bennett, 637 P.2d 208 (Or. Ct. App. 1981). Evidence of prior sexual relations between the complainant and defendant, which occurred nine years prior to trial, was properly excluded. *Id.* at 210. Its only possible relevance would have been to show that the complainant had a motive for making a false accusation, so that her husband would not find out about her infidelity. *Id.* The defendant, however, denied that the incident for which he was tried had occurred; hence its relevance to show a motive to fabricate the current charge was minimal. *Id.*

202. 13 F.3d 998 (7th Cir. 1994) (en banc).

course,²⁰³ the defendant sought to testify that as the two of them were doing it “doggy fashion,” he said to her, “[d]on’t you like it like this? . . . Tom Hall said you did.” The defendant also testified that he mentioned something about switching partners; that she got mad at him, ordered him to leave her trailer (which he did), and subsequently accused him of rape.²⁰⁴ The trial court only allowed him to testify that he “said something that upset” the complainant, but not the specifics of what he said. The state supreme court affirmed the conviction.²⁰⁵ On habeas, the Seventh Circuit affirmed, concluding that the trial court properly balanced the defendant’s rights and the policies underlying the state rape shield statute, in particular the need to protect the complainant from embarrassment and humiliation.²⁰⁶

Four judges dissented:

The plausibility of Stephens’ defense turned in substantial part on whether the jury could be persuaded that something Stephens had said to the complainant could have so enraged her that she would have responded in the manner he alleged. Central to Stephens’ case then are the words he claims to have said that night, words the jury never heard. . . . The jury might well have disbelieved Stephens’ testimony even if he had testified fully; however, it is hard to imagine his story being believed absent this evidence.²⁰⁷

The dissent appears to have the more persuasive argument. The Supreme Court previously held that a party should not be restricted to eliciting testimony to the *fact* of a witness’s bias. Where the witness’s testimony is crucial to the case, impeachment should also include information necessary to reveal the “*source and strength*” of the bias.²⁰⁸ The bland, sani-

203. *Id.* at 1000. Complainant testified that the defendant entered her trailer late at night while she was asleep and forced himself upon her; he testified that she invited him in and consented—at first—to intercourse. *Id.*

204. *Id.* at 1010 (Cummings, J., dissenting). His defense was essentially this: “she accused me of rape because I am a clod, a pig and a total jerk.”

205. *Stephens v. Indiana*, 544 N.E.2d 137 (Ind. 1989).

206. *Stephens*, 13 F.3d at 1002.

207. *Id.* at 1010 (Cummings, J., dissenting).

208. *United States v. Abel*, 469 U.S. 45, 54 (1984). Abel and two confederates were indicted for bank robbery. *Id.* at 47. The codefendants pleaded guilty and one of them, Ehle, testified against the defendant. *Id.* To impeach Ehle, the defendant called another witness, Mills, who testified that Ehle had falsely incriminated Able in order to receive favorable treatment from the Government. *Id.* To impeach Mills, the prosecutor questioned him on cross-examination as to his membership in a secret prison organization that required its members to lie, steal or kill on behalf of another member. *Id.* at 47-48. After Mills denied any knowledge of the organization, the prosecutor, in rebuttal, recalled Ehle to testify that he, the defendant and Mills were all members of the organization. *Id.*

The Supreme Court, per Chief Justice Rehnquist, unanimously upheld the action of the

tized, content-empty version of events to which the court restricted Stephens deprived his defense of its "source and strength."

Immediately after concluding that "[t]he interests served by the Indiana Rape Shield Statute justify this very minor [sic] imposition on Stephens' right to testify," the Seventh Circuit added, "We note also that Stephens and [complainant] told drastically different stories of what happened and that Stephens directed [a friend] to commit perjury."²⁰⁹ This helps to justify and explain the exclusion of the defendant's testimony, however, only if a trial court is permitted to assess witness credibility in ruling on evidence that relates to the complainant's prior sexual behavior.²¹⁰ If, on the other hand, a judge is required to assume that a defendant's testimony is true when deciding its admissibility, exclusion on this ground would be unjustified.²¹¹ Other options short of exclusion could have adequately protected the complainant.²¹²

trial judge. *Id.* at 49. Ehle's testimony concerning Mills' and Abel's membership in the gang was sufficiently probative of Mills' possible bias towards Abel to warrant its admission into evidence. *Id.* The Court rejected the defendant's contention that this "inflamed" and unduly prejudiced the jury against him and that the district court therefore abused its discretion under FRE 403 in permitting Ehle to describe the organization's beliefs and practices. The Court also rejected the defendant's claim that the trial court should have cut off testimony after the prosecutor had elicited that Mills knew Abel and belonged to an organization together. *Id.* at 53. The court noted:

This argument ignores the fact that the *type* of organization in which a witness and a party share membership may be relevant to show bias . . . [T]he attributes of the [organization]—a secret prison sect sworn to perjury and self-protection—bore directly not only on the *fact* of bias but also on the *source* and *strength* of Mills' bias.

Id. at 54.

The Court noted that the district court took steps to limit the prejudicial effect of the contested evidence. *Id.* at 48. The trial judge instructed the prosecutor and Ehle not to use the organization's name ("Aryan Brotherhood"), and sustained Abel's objections to the prosecutor's questions to Ehle concerning the punishment meted out to unfaithful members (death). *Id.* Moreover, the judge offered to give a limiting instruction concerning the use the jury could make of Ehle's testimony. *Id.* at 54. Thus, while the trial court could not prevent all prejudice, it successfully averted any undue prejudice to the defendant. *Id.* at 53.

209. *Stephens*, 13 F.3d at 1002. When arrested, the defendant told police that Stone, a friend, had given him a lift to a local store and that he then walked to the trailer of other friends. *Id.* at 1000. Stone confirmed this version on direct examination; on cross, he admitted that he had dropped the defendant off at complainant's trailer and had lied on direct pursuant to defendant's instructions. *Id.*

210. Evidence that a defendant sought to fabricate evidence supports the inference of consciousness of guilt, and therefore the inference of guilt itself. 2 C. FISHMAN, JONES ON EVIDENCE § 13:13 (7th ed. 1994).

211. See *infra* part IX.

212. The judge could have restricted the defendant without depriving him of the right to present a meaningful defense: unless the defendant could show that the identity of the person who allegedly told Stephens about the complainant's supposed preferences was a significant factor in her reaction, the court could have instructed the defendant to testify

In cases involving child complainants, defendants often offer evidence to support a defense that the complainant falsely accused the defendant to get back at him for interfering with her sexual relationship with someone else,²¹³ although other situations also arise.²¹⁴

that "someone" told him this, without naming the particular individual. Immediately after admitting such testimony, the judge could instruct the jury: "You can consider what the defendant said to the complainant, if you believe he said it, only in deciding whether that may have motivated the complainant to accuse the defendant falsely. It is not evidence of any prior sexual behavior on the part of the complainant, and you must draw no conclusions about the complainant from it." The prosecutor could have recalled the complainant in rebuttal to deny the defendant made any such statement, assuming she denied that he did so, and to reiterate that she accused him of rape because he raped her. Finally, the court could have instructed the defendant to make no attempt, either by cross-examination of the complainant or otherwise, to introduce evidence of her prior sexual behavior.

213. *State v. Kulmac*, 644 A.2d 887 (Conn. 1994). Evidence that the complainants had been sexually abused by other men was not admissible to support the defendant's argument that they had blamed him for assaults perpetrated by others in order to shield the actual abusers from harm where the complainants had also reported the other abusers to the police. *Id.* at 894-95.

Commonwealth v. Black, 487 A.2d 396 (Pa. Super. Ct. 1985). The defendant was charged with statutory rape and incest of his thirteen-year-old daughter. *Id.* at 397. The court ruled that defendant should have been allowed to demonstrate (1) that the complainant had maintained an ongoing sexual relationship with her fifteen-year-old brother which ended when the brother left home after a violent argument with the defendant; and (2) that complainant wanted to punish defendant for his interference with her sexual relationship with her brother and to remove defendant from home so her brother might return. *Id.* at 401.

Commonwealth v. Elder, 452 N.E.2d 1104, 1110 (Mass. 1988) (excluding evidence of prior sexual history because the defendant offered ample other evidence of bias). See *supra* note 210.

Commonwealth v. Poindexter, 539 A.2d 1341, 1344 (Pa. Super. Ct. 1988) (excluding evidence as irrelevant because the defendant offered ample other evidence of motive for retaliation).

214. *Daniels v. State*, 767 P.2d 1163 (Alaska Ct. App. 1989). The complainant, a fourteen-year-old, accused her foster father of rape. *Id.* at 1165. The defendant alleged that the complainant falsely accused him in retaliation for being told she could not remain in his home. *Id.* The Alaskan appellate court held it was reversible error to preclude the defendant's wife from testifying that shortly before the complainant made the accusation, she had told the complainant that a school counselor had informed her that the complainant had sodomized a five-year-old boy, and that because she and her husband had young sons of their own, the complainant could no longer stay with them, but would have to go to a state institution. It was also error to preclude the defendant from cross-examining the complainant about this. *Id.* at 1166-67. Although the trial judge had permitted the defendant's wife to testify she had told the girl she could not stay any longer with the family, this was not enough. *Id.* at 1166.

Stripped of any meaningful detail and communicated to the jury only in the most abstract and conclusory terms, the claim that the Daniels had reached the decision not to keep S.B. as a foster child just before S.B. accused Daniels of sexual abuse could only have seemed an anemic contrivance Evidence disclosing the specific nature of Debra Daniels' communication with S.B. would have established a potentially strong reason for S.B. to have wanted to retaliate against the

5. Motive Related to Drugs

In some cases the defendant may seek to introduce evidence that supports his allegation that the complainant accused him of rape after a disagreement relating to drugs. Drugs, like love and sex, have been known to prompt strong and irrational reactions. Three Maryland decisions illustrate the difficulties presented in these cases.

In *Johnson v. State*,²¹⁵ the complainant acknowledged at a rape shield hearing that she was a crack addict, and that when she wanted to get high, she would "freak" (i.e., exchange sex for drugs). She admitted "freaking" in the immediate neighborhood of the alleged rape for approximately six months, most recently one week before the alleged rape.²¹⁶ At trial, the complainant testified that she was a crack addict, that she had spent all of her money on an eight-hour crack binge, but had obtained additional money from a friend, and was attempting to purchase more crack from a man, when he, the defendant, and another man raped her.²¹⁷ The defendant alleged that the complainant willingly had sex with the three men because one of the men promised to give her crack in return, then falsely accused them of rape when the would-be supplier reneged.²¹⁸ The state's highest court concluded that her addiction created a "disposition" to "freak," and that this disposition provided sufficient special relevance to overcome the inflammatory and prejudicial nature of the evidence. The Maryland court held it was reversible error to preclude the defendant from cross-examining the complainant about her "freaking":

Daniels. Moreover, by suggesting that S.B.'s accusation against Daniels was in effect a *quid pro quo*, the excluded line of inquiry would have tended to explain why S.B.'s anger found expression in the form of an accusation of sexual abuse.

Id.

Commonwealth v. Wall, 606 A.2d 449 (Pa. Super. Ct. 1992). Evidence that a twelve-year-old child had previously been removed from her mother's home and placed with her aunt and uncle after she was sexually abused by her mother's paramour was admissible in a prosecution of the child's uncle for involuntary deviate sexual intercourse and corruption of a minor. *Id.* at 462. The court concluded that the evidence supported the uncle's contention that the child fabricated the sexual abuse allegations against him in the hope that she would be removed from her aunt and uncle's home in order to avoid her aunt's harsh discipline; the evidence was relevant, noncumulative, and more probative than prejudicial. *Id.* at 458.

State v. Lucero, 784 P.2d 1041 (N.M. Ct. App. 1989). Held: it was error to exclude evidence suggesting that the complainant's mother, afraid she might lose custody of the complainant to her ex-husband because of the incident, convinced the child to blame the defendant instead of someone else, perhaps the mother's boyfriend. *Id.* at 1044.

215. 632 A.2d 152 (Md. 1993).

216. *Id.* at 154.

217. *Johnson v. Maryland*, 613 A.2d 450, 452 (Md. Ct. Spec. App. 1992), *cert. granted*, 613 A.2d 547 (Md.), and *rev'd*, 632 A.2d 152 (Md. 1993).

218. *Id.* at 452-53.

As we have seen, the critical issue in this case is whether, on this occasion, the victim was freaking for cocaine or was raped. And, because these are the only possible explanations for what occurred, evidence that she has freaked for cocaine in the past and, particularly, the very recent past, has special relevance to that issue; such evidence transcends mere evidence of bad character or, in the context of this case, sexual promiscuity. In turn, it is relevant to, and probative of, the victim's motive. From a finding that on this occasion she was freaking for cocaine but did not receive the bargained for cocaine, the jury could then infer that the victim had an ulterior motive for making a false accusation of rape against the petitioner.²¹⁹

In so holding, the court contrasted *White v. State*,²²⁰ in which the same court upheld the exclusion of similar evidence. In *White*, the defendants, accused of kidnapping and rape, insisted that they merely had smoked cocaine with the complainant and then rejected her offer of sex in exchange for more cocaine. The defendants sought to introduce testimony that on previous occasions, the complainant had asked other individuals to provide cocaine in return for sex. The court concluded that because of the prejudicial effect, such testimony was not admissible to support their defense that she falsely accused them of rape out of anger from rejection of her offer and to conceal from her fiancé that she had been out smoking cocaine with two men. In distinguishing *White*, the *Johnson* Court commented,

[I]n *White*, the issue was not whether the victim had exchanged sex for drugs, but rather, whether she had [sex] at all. Under the circumstances, there could be no *direct* relationship between the proffered testimony of the witness who would have testified to the victim's having previously engaged in sex for drugs with him and the ulterior motives the defendant offered in defense.²²¹

It appears the court correctly decided both cases. The evidence in *Johnson* was far more probative than that in *White* in four ways. First, *Johnson's* proof that the complainant bartered herself for cocaine was from an unimpeachable source—the complainant herself; second, it was clear that she had done so frequently and recently;²²² third, there was greater similarity between the complainant's prior conduct and the de-

219. *Johnson*, 632 A.2d at 159-60.

220. 598 A.2d 187 (Md. 1991).

221. *Johnson*, 632 A.2d at 160.

222. *Id.* at 160-61. "[E]vidence that the victim freaked for cocaine one week prior to the alleged rape . . . is weaker—than [would be] evidence that she had freaked for cocaine the day before or an hour before. On the other hand, it is more probative than that she had done so within the six months before the alleged rape." *Id.*

fendant's version of events; and finally, the alleged motive to lie was more plausible and persuasive.²²³

An intermediate state court arrived at a more questionable result in *Miles v. State*.²²⁴ One of two defendants accused of rape and robbery alleged that he sold drugs for the complainant and had a sexual relationship with her.²²⁵ He asserted she had a motivation to bring false charges against him when he failed to pay her for drugs she had advanced him on consignment.²²⁶ The complainant denied these allegations at an *in camera* hearing, and the trial court did not permit the defendant to question her about them before the jury.²²⁷ On appeal, the intermediate court concluded this exclusion did not constitute reversible error because defense counsel would have received the same negative answers if the same questions were provided before the jury.²²⁸ Thus, the evidence was excluded "not . . . because of the trial judge's ruling, but . . . because the witnesses . . . did not testify as they had hoped."²²⁹ That an accusing witness will not answer a question as the defendant would prefer, however, does not justify depriving the defendant of the opportunity to confront the witness with the question.

B. Restricting Admissibility

Admission is not an all-or-nothing proposition. Where possible, a court should restrict the evidence that goes before the jury to protect the complainant to the greatest extent possible while also affording the defendant his constitutional right to confront his accuser and present his case. A number of courts, embracing the distinction that the Pennsylvania Supreme Court rejected in *Berkowitz*, have admitted evidence concerning allegations of sexual conduct, while excluding evidence of the conduct itself,²³⁰ although occasionally courts have gone too far in sani-

223. Compare *Johnson*, *supra* note 217 with *White*, *supra* note 220.

224. 594 A.2d 634 (Md. Ct. Spec. App.), *cert. denied*, 599 A.2d 447 (Md. 1991).

225. *Id.* at 636.

226. *Id.* The defendant had consumed the drugs himself and did not have any money to pay the complainant for them.

227. *Id.*

228. *Id.*

229. *Id.* at 636-37.

230. *State v. Rogers*, 642 A.2d 932, 934-35 (N.H. 1994) (holding, in a prosecution for having sex with a child under the age of consent, that the trial court properly restricted cross-examination of the complainant to asking her whether the defendant had told her he had observed her having sex with other men and was going to report that to her mother, while precluding cross-examination about the truth of the alleged other episodes).

Commonwealth v. Poindexter, 539 A.2d 1341 (Pa. Super. Ct. 1988). The complainant accused her father of incest and rape. *Id.* at 1343. The defendant maintained that she fabricated the charge out of revenge because he had brought charges against her boyfriend

tizing such evidence.²³¹

Several courts have justified exclusion on the ground that ample evidence of the witness's bias diminished the probative value of the complainant's prior sexual conduct.²³² Given the impact sexual intimacy so

for his sexual activity with her. *Id.* at 1344. The court held the fact that the defendant had filed sex offense charges against the boyfriend was properly admitted, but that evidence of her prior sexual activity with the boyfriend was inadmissible as irrelevant. *Id.*

231. See *Stephens v. Miller*, 13 F.3d 998, 1002 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 57 (1994) (discussed *supra* note 202 *et seq.*); *Daniels v. State*, 767 P.2d 1163, 1166 (Alaska Ct. App. 1989) (discussed *supra* note 214).

232. See *Marr v. State*, 494 So. 2d 1139 (Fla. 1986). The court held that the complainant's prior sexual activity with her boyfriend was not admissible to show that she fabricated the charges solely because of personal animosity between her boyfriend and the defendant, because the defendant was able to show the depth of the relationship between the complainant and her boyfriend without evidence of their sexual relationship, and his questioning of the boyfriend elicited details of incidents demonstrating the animosity between the boyfriend and defendant. *Id.* at 1243.

Commonwealth v. Domaingue, 493 N.E.2d 841 (Mass. 1986). In a prosecution for incest, evidence of past sexual conduct was excluded because there was no substantial evidence of bias. *Id.* at 846.

Commonwealth v. Elder, 452 N.E.2d 1104 (Mass. 1983). Complainant, a fourteen-year-old girl, accused the man she and her mother were living with of statutory rape. *Id.* at 1106. The defendant sought to prove the charge was motivated by hostility because he interfered with her desire to have sex with her boyfriend. *Id.* at 1109. The court held the defendant was able to establish complainant's hostility and bias against him without introducing evidence of her prior sexual history; hence, the trial court properly refused to admit the proffered evidence. *Id.* at 1109-10.

State v. Morrison, 351 S.E.2d 810 (N.C. Ct. App.), *cert. denied*, 354 S.E.2d 724 (N.C. 1987). T, a friend of the complainant, testified that on the night in question, the complainant, naked below the waist and in hysterics, pounded on his apartment door crying that the defendant had attempted to rape her. *Id.* at 811-12. At trial, the complainant testified that though she and T had dated, they were not "boyfriend and girlfriend." *Id.* at 813. In a hearing out of the jury's presence, T confirmed this assessment of their relationship, although he also testified that he and complainant had slept together a few times. *Id.* The North Carolina Court of Appeals held that the trial court properly excluded evidence of their sexual relationship from the jury. *Id.* Though relevant to impeach T as well as the complainant, the court reasoned that the probative value was slight because she and T had admitted that they were friends and had dated, and its admission "would greatly increase the risk of prejudicing the jury." *Id.*

The decision is correct, but it could have been better explained. The fact that a man and a woman are "friends" and have "dated" suggests his possible bias in her favor to a certain extent, but evidence that they have slept together suggests it much more powerfully. A better basis for the decision was that T's bias, if any, was rendered practically irrelevant by the presence of overwhelming evidence of guilt. The complainant alleged, and the state offered considerable corroboration, that the defendant, a police officer, had developed an obsession with her and had called her dozens of times daily, demanding that she date him despite her repeated refusals. Finally, she agreed to see him, hoping to persuade him to leave her alone. He coaxed her into his apartment and then attacked her; during their struggle she hit him in the head with a hammer, cut him with a knife, set fire to a towel on the stove and finally escaped into an open area of the apartment complex and began banging on T's door. Another policeman who happened to be at the apartment complex asked

often has on human emotions and conduct, however, a court should be cautious in relying too readily on this justification to exclude such evidence.²³³ Additionally, an exclusion that deprives the defendant of an opportunity to demonstrate a complainant's supposed motive to lie, as occurred in *Stephens v. Miller*,²³⁴ violates a defendant's constitutional guarantees to confront his accusers and present a defense.²³⁵

V. PRIOR RAPE ALLEGATIONS MADE BY COMPLAINANT

Other than murder, sexual assault is perhaps the most serious accusation one person can make against another. The accusation alone is likely to permanently damage the accused's reputation, jeopardize his professional standing, and disrupt and traumatize his family. To accuse someone falsely of sexual assault is, therefore, a despicable and malignant act which reveals far more about the accuser's character than do other, more common, less destructive falsehoods.

It is scarcely surprising that a defendant accused of sexual assault would want the fact-finder to learn that the complainant previously made one or more false accusations of sexual assault. Such evidence is highly relevant on the question of whether the complainant fabricated the current charges against the defendant. The consensus is that the defendant has a constitutional right to introduce such evidence.²³⁶ Evidence that the complainant made one or more previous sexual assault complaints, *without* sufficient evidence that those complaints were false, is, by contrast, generally excluded.²³⁷

Thus, several issues arise when a defendant offers evidence of prior accusations or complaints. First, does rape shield legislation apply to such evidence? Second, does relevancy (the threshold requirement of admissi-

T and T's fiance (who was visiting at the time) to take complainant in, then went to the defendant's apartment; signs of a struggle were evident and the defendant was covered with blood. Moreover, the defendant did not testify. Given all this evidence, the probative value of T's bias in the complainant's behalf was minimal at best.

233. In some cases, an appellate court's refusal to reverse a conviction on the ground that evidence of bias was of low probative value might better have been based on a harmless error analysis.

234. See *supra* note 202 and accompanying text.

235. For suggestions as to how the trial court could have better balanced the conflicting interests in *Stephens*, see *supra* note 212.

236. See *infra* note 238; see also Nancy M. King, Annotation, *Impeachment or Cross-Examination of Prosecuting Witness in Sexual Offense Trial by Showing that Prosecuting Witness Threatened to Make Similar Charges Against Other Persons*, 71 A.L.R.4TH 448, 453 (1989); Nancy M. King, Annotation, *Impeachment or Cross-Examination of Prosecuting Witness in Sexual Offense Trial by Showing that Similar Charges Were Made Against Other Persons*, 71 A.L.R.4TH 469, 474-75 (1989).

237. See *infra* note 255.

bility) depend upon whether the defendant can offer proof that the prior allegation was false? Third, what quality of proof is required to establish that the complainant made a prior complaint and that the prior complaint was false? Fourth, assuming evidence relating to prior complaints is admissible, is its use restricted to cross-examination of the complainant, or may the defendant also offer extrinsic evidence of the prior complaints and their falsity?

A. Applicability of Rape Shield Legislation

1. Prior False Accusations

Rape shield legislation should not exclude evidence that the complainant previously made false sex offense accusations. Several statutes contain explicit provisions to this effect.²³⁸ Even in the absence of such provisions, the consensus is to admit this type of evidence over a rape shield objection.²³⁹ Rape shield legislation is designed to protect a com-

238. Colorado permits the judge to admit "evidence that the victim has a history of false reporting of sexual assaults" if, after a hearing, the evidence "is relevant to a material issue to the case." COLO. REV. STAT. § 18-3-407(2) (1986).

Mississippi similarly categorizes evidence of "[f]alse allegations of past sexual offenses made by the alleged victim at any time prior to the trial" as an exception to the general ban of evidence of the complainant's past behavior. MISS. R. EVID. 412(b)(2)(C).

Wisconsin similarly excepts from the general ban "[e]vidence of prior untruthful allegations of sexual assault made by the complaining witness." WIS. STAT. § 972.11 (2)(b)(3) (1985).

239. *United States v. Stamper*, 766 F. Supp. 1396, 1400 (W.D.N.C. 1991).

West v. State, 719 S.W.2d 684, 686-87 (Ark. 1986).

Smith v. State, 377 S.E.2d 158, 160 (Ga.), *cert. denied*, 493 U.S. 825 (1989).

People v. Sandoval, 552 N.E.2d 726, 737-38 (Ill.), *cert. denied*, 498 U.S. 938 (1990) (dictum).

Stewart v. State, 531 N.E.2d 1146, 1148-49 (Ind. 1988).

People v. Hackett, 365 N.W.2d 120, 124-25 (Mich. 1984) (dictum); *People v. Makela*, 383 N.W.2d 270, 276 (Mich. Ct. App. 1985) (despite the rape-shield statute, the defendant could seek an *in camera* hearing to determine whether the complainant had made false accusations of rape against a third party).

Efrain M. v. State, 823 P.2d 264, 265 (Nev. 1991); *Miller v. State*, 779 P.2d 87, 89 (Nev. 1989).

People v. Mandel, 425 N.Y.S.2d 63, 64 (N.Y. 1979), *cert. denied*, 446 U.S. 949 (1980); *People v. Lippert*, 525 N.Y.S.2d 390, 391 (N.Y. App. Div. 1988).

State v. LeClair, 730 P.2d 609, 613 (Or. Ct. App. 1986) (dictum).

Clinebell v. Commonwealth, 368 S.E.2d 263, 264 (Va. 1988).

State v. Moats, 457 N.W.2d 299, 312 (Wis. 1990); *State v. Padilla*, 329 N.W.2d 263, 265 (Wis. Ct. App. 1982).

See Ex parte Foster, 548 So. 2d 478 (Alaska 1988). The Court apparently held that the trial judge should have admitted evidence of a sign, posted in the local court's warrant clerk's office, warning officers not to accept complaints from the complainant due to her history of making false complaints. *Id.* at 480. The opinion does not state whether the sign

plainant from exposure of her prior sexual conduct. A prior false accusation is not "sexual conduct,"²⁴⁰ thus the statute should not protect the complainant from exposure of prior lies or falsehoods.²⁴¹ Likewise, there is no reason to exclude evidence of prior untrue accusations from a corroborating witness.²⁴²

A few courts, nevertheless, have ruled that rape shield legislation bars evidence of prior false accusations.²⁴³ Ohio's Supreme Court held that if the complainant admits she made a prior false rape accusation, the trial judge should hold an *in camera* hearing to ascertain whether she lied completely (i.e., accused a man of rape when no sexual activity occurred), or only lied partially (i.e., consented to the sex and then falsely accused the man of rape). The court ruled, in *State v. Boggs*,²⁴⁴ that if the complainant's prior accusation was totally unfounded, the defendant could inquire about it on cross-examination.²⁴⁵ But, if according the complainant, consensual sexual activity occurred in the prior incident which the complainant then falsely claimed was rape, the state's rape shield statute prohibited cross-examination. This result is unfair, unjust, and hopefully, unconstitutional. It is appropriate for the law to protect a woman's decision to have sex with other men from unnecessary exposure because, among other reasons, it has only minimal probative value as to whether or not she consented with the defendant. A false accusation of rape, by contrast, reveals flaws in character—a ruthless disregard of the truth and a willingness to use sexual allegations unjustly—which are highly relevant as to whether she has falsely accused the defendant. Such conduct de-

specified the kind of complaints. The sign, the court held, was admissible evidence of complainant's reputation for untruthfulness. *Id.* at 479.

240. This is clearly so where no sexual conduct had occurred between the complainant and the person she previously accused. Even where there had been consensual sexual conduct which the complainant falsely alleged was forcible, the evidence is offered to prove the falsity of the accusation. This, in most cases, would be sufficiently relevant to survive a rape shield law objection.

241. This reasoning explicitly or implicitly underlies each of the cases cited earlier in this paragraph. *See supra* note 239.

242. *Lawrence v. United States*, 482 A.2d 374, 377 (D.C. 1984).

243. *United States v. Cardinal*, 782 F.2d 34, 36 (6th Cir.), *cert. denied*, 476 U.S. 1161 (1986); *Hollis v. State*, 380 So. 2d 409, 411 (Ala. Ct. App. 1980); *Carter v. State*, 451 N.E.2d 639, 644-45 (Ind. 1983) (interpreting a statute that had since been repealed); *see Commonwealth v. Gaddis*, 639 A.2d 462, 466-67 (Pa. Super. Ct. 1994) (suggesting that false accusations against others would not be admissible because it was not established that "they were motivated by any bias or hostility toward appellant"). This comment appears to confuse two separate exceptions to rape shield exclusion. The result in *Gaddis* is better defended on an alternate ground. *See infra* note 266.

244. 588 N.E.2d 813 (Ohio 1992).

245. *Id.* at 818. If either consensual sex or a rape had occurred, cross-examination would be prohibited. *Id.*

serves exposure, not protection.

2. Prior True Accusations

A number of courts hold that rape shield legislation does not exclude evidence that the complainant previously has been raped or otherwise abused. These courts reason that a previous sexual assault on the complainant does not reflect on her character for chastity.²⁴⁶ Although the argument that being raped is not "sexual conduct" within the scope of rape shield legislation is superficially plausible, it ignores the fact that many rape victims feel a deep sense of shame.²⁴⁷ Exposure of this information could cause some women as much or even more embarrassment and humiliation than exposure of consensual sex.²⁴⁸ Moreover, the rape of the complainant on a prior occasion generally will have little relevance, and may distract the jury.²⁴⁹ Such evidence, therefore, should be excluded²⁵⁰ except in unusual circumstances where its relevance is clearly shown.²⁵¹

246. A number of courts have so held with regard to victims of child abuse, *see supra* note 230. Some courts, however, have so held regardless of the age of the complainant. *See, e.g.*, *State v. Johnson*, 311 S.E.2d 50, 52 (N.C. Ct. App. 1984) (explained in greater detail, *infra* note 251); *Commonwealth v. Johnson*, 638 A.2d 940, 942 (Pa. 1994) (involving a minor, but the court's discussion of the question is not limited to such cases).

247. *See* Pamela A. Wilk, Comment, *Expert Testimony on Rape Trauma Syndrome: Admissibility and Effective Use in Criminal Rape Prosecution*, 33 AM. U. L. REV. 417, 427 (1984) (listing shame as one of the symptoms of the acute phase of rape).

248. *E.g.*, *State v. Sieler*, 397 N.W.2d 89, 92 (S.D. 1986) (concluding that requiring the defendant to show that the complainant's previous sex offense accusation was "demonstrably false" appropriately keeps the focus on the defendant rather than the complainant).

I sympathize with those who urge that the best way to remove the stigma that traditionally accompanies being raped is for rape victims to speak out. *See, e.g.*, Elaine Johnston, 'Survivors Should Be Able to Share the Horror': Changes Will Come Only if We Speak Out, *A Rape Victim Argues*, VANCOUVER SUN, May 29, 1993, at B5; Tony Perry, *Rape Victim Fights Back and Takes Story Public; Crime: Woman Breaks a Taboo and Spurs Community to Act*, L.A. TIMES, Jan. 1, 1995, at A1; Megan Rosenfeld, *Breaking the Silence; Rape Victims*, REDBOOK, Dec. 1993, at 98. To have to testify about a prior, unrelated assault may nevertheless be a difficult and humiliating experience to some complainants.

249. *State v. LeClair*, 730 P.2d 609, 616 (Or. Ct. App. 1986) (even when the defendant introduces proof that the complainant made prior similar *untrue* allegations, the result is often a minitrial within the trial about the facts in the prior incident).

250. *Commonwealth v. Bohannon*, 378 N.E.2d 987, 991 (Mass. 1978) (distinguishing the question's relation to prior allegations of rape from the complainant's prior sexual activity); *accord LeClair*, 730 P.2d at 613 (ruling that only a prior accusation of rape which has been proven to be false will be admissible); *Sieler*, 397 N.W.2d at 92. The Pennsylvania and North Carolina cases cited *supra* note 246 also acknowledge that such evidence generally is not relevant in the trial of an unrelated rape charge against a different defendant.

251. *Steward v. State*, 636 N.E.2d 143, 149-50 (Ind. Ct. App. 1994) (discussing the error of excluding evidence of prior molestation which supported the defendant's case); *see supra* note 99.

Commonwealth v. Baxter, 627 N.E.2d 487 (Mass. Ct. App. 1994). The court held that it

B. Matters of Proof

1. Proving Complainant Made a Prior Accusation

Several courts hold that before a defendant may cross-examine a complainant about previous accusations of sexual assault, the defendant must first satisfy the trial judge that the complainant in fact made the accusations.²⁵² In most cases adequate proof consists of evidence that the complainant made a complaint or accusation to the police or other authority.²⁵³ Courts also accept evidence, however, that the complainant made an accusation to a friend or other private citizen, even if the com-

was error to exclude evidence that complainant had been raped on a prior occasion and was suffering from psychological problems as a result of that assault as well as evidence indicating numerous remarkable similarities between that event and the present incident. The court found that the evidence presented a plausible case that the complainant was unable to distinguish the two events. *Id.* at 489-90.

State v. Johnson, 311 S.E.2d 50, 52-53 (N.C. Ct. App. 1984) (holding that testimony that the complainant told the defendant about a prior rape should be admitted where the defendant contended that the very fact she had told him about such a personal event demonstrated that they had shared an emotional intimacy which, in turn, suggests she may have consented to sexual intimacy as well).

As discussed earlier, some courts have found sufficient relevance in child abuse cases, either to show an alternate source for sex-related injuries, *see supra* note 95 and accompanying text, or to overcome the "sexual innocence inference," *see infra* notes 395-96 and accompanying text.

252. *State v. Superior Court of Arizona*, 744 P.2d 725 (Ariz. Ct. App. 1987). The complainant testified at a rape shield hearing that she had been raped three years prior to the incident involving the defendant, but had not reported the matter to the authorities. *Id.* at 730. The appellate court held that cross-examination at trial about the prior incident would be improper because the defense had not provided sufficient evidence that the victim had previously accused anyone of the crime. *Id.* at 731.

People v. Simbolo, 532 P.2d 962 (Colo. 1975). In a statutory rape prosecution the trial court denied the defense permission to ask the eleven-year-old complainant whether she had made similar accusations against another man in another state. *Id.* at 963. The Colorado Supreme Court held this was not error. Defendant had offered no proof as to whether such an event took place and was unable to identify his source of such information. *Id.*

Koo v. State, 640 N.E.2d 95 (Ind. Ct. App. 1994). Complainant acknowledged at a rape shield hearing that several years earlier she had gone to a clinic because of a "forced sexual encounter" with a former boyfriend, but protested that personnel at the clinic "might . . . have construed it as rape, but in my mind, it wasn't." *Id.* at 103. The Indiana Court of Appeals held this was insufficient to establish that she had charged the former boyfriend with rape. *Id.*

For cases that similarly uphold an exclusion for insufficient proof that complainant made prior accusations *see, e.g.*, *People v. Ellison*, 411 N.E.2d 350, 358 (Ill. Ct. App. 1980); *Commonwealth v. Blair*, 488 N.E.2d 1200, 1202 (Mass. App. Ct. 1986); *Commonwealth v. Gaddis*, 639 A.2d 462, 466-67 (Pa. Super. Ct. 1994); *State v. Sieler*, 397 N.W.2d 89, 92 (S.D. 1986).

253. *See Ellison*, 411 N.E.2d at 359 (denying admissibility of prior accusations of rape because the defendant failed to offer evidence of charges that the plaintiff had made or documentation of those charges).

plainant later denies having done so.²⁵⁴

2. *Proving the Prior Accusation Was False*

The defendant may prove the falsity of the prior accusation through evidence demonstrating that the complainant later recanted the prior accusation.²⁵⁵ In unusual circumstances, evidence of prior accusations with-

254. *People v. Burrell-Hart*, 237 Cal. Rptr. 654, 657 (Cal. Ct. App. 1987).

255. *Id.* at 657. During cross-examination at a rape shield hearing, defense counsel asked the complainant if she had ever accused a named third party of having attempted to rape her. *Id.* at 656. She testified to a fight between herself and the third party and stated that following the fight she had told someone about the incident but denied stating that the man had either raped or attempted to rape her. *Id.* Held: the trial court erred, albeit harmlessly in light of ample other evidence of guilt, in excluding the testimony of the person to whom the prior accusation allegedly was made. *Id.* at 656-58. Such evidence could support a finding that the complainant, having previously made a false accusation of physical and threatened sexual abuse against a man with whom she had fought, would under similar circumstances have a motive to testify falsely against the defendant with whom she admittedly had a prior disagreement. *Id.* at 656-57.

Smith v. State, 377 S.E.2d 158 (Ga.), *cert. denied*, 493 U.S. 825 (1989). Held: it was error to exclude evidence that the complainant had accused ten or twelve people of sexual misconduct and later recanted some of these accusations. *Id.* at 159-60. The court emphasized that the rape shield law did not prohibit evidence that the complainant lied about sexual misconduct; such evidence did not involve her past sexual conduct but rather the victim's propensity to make false statements regarding sexual misconduct. *Id.* at 160.

Cox v. State, 443 A.2d 607, 613-14 (Md. Ct. Spec. App. 1982), *aff'd*, 468 A.2d 319 (Md. 1983). The trial court erred in not allowing the defendant to challenge the victim's credibility by questioning her about a previous incident where she allegedly charged another man with assault and later recanted her testimony against him under cross-examination.

Thomas v. State, 669 S.W.2d 420 (Tex. Ct. App. 1984). Held: the trial court's refusal to permit cross-examination of a ten-year-old complainant in the jury's presence regarding admittedly false past accusations of rape and attempted rape deprived the defendant, the complainant's stepfather, of his constitutional right to fully examine a witness testifying against him. *Id.* at 423. The complainant and her mother both testified, out of the hearing of the jury, that at least one of the prior accusations was false. *Id.* at 421-22. The appellate court stated: "Although the false accusations may have indicated emotional or psychological trauma rather than lack of trustworthiness, the jury should have been allowed to hear the testimony and decide on the issue of the complainant's credibility." *Id.* at 423.

A number of courts reached similar conclusions in cases substantially predating rape shield legislation:

People v. Hurlburt, 333 P.2d 82, 87-88 (Cal. Ct. App. 1958) (discussing a case involving a nine-year-old complainant).

People v. Wilson, 137 N.W. 92 (Mich. 1912). The case involved a fifteen-year-old complainant who admitted to charging three others falsely. *Id.* at 92. The court emphasized that the evidence was not offered to prove other sexual acts of on her part or to show that her credibility could be affected by her lack of chastity; rather, the evidence was offered to show that she was subject to hallucinations or some type of mental dysfunction which gave her a propensity for making charges of this kind. *Id.*

State v. Crabtree, 296 N.W. 79, 82 (Wis. 1941) (allowing cross-examination of conflicting testimony regarding prior acts of intercourse).

But see State v. Weymouth, 496 A.2d 1053 (Me. 1985). The defendant was prosecuted

out more may support the inference that the prior complaints were probably false.²⁵⁶ It is insufficient, however, merely to show that no arrest was made, that the charges were dropped, or that the accused was acquitted.²⁵⁷

for incest with his daughter, and offered evidence that after she accused him, she also accused her stepfather of abusing her but later recanted that accusation. *Id.* at 1056. Held: no error to exclude this evidence because its relevance was outweighed by its potential for confusing the jury. *Id.*

256. *People v. King*, 156 Cal. Rptr. 268, 273 (Cal. Ct. App. 1979) (approving the trial judge's decision to permit the defendant to cross-examine the complainant about her claim to have been raped on six previous occasions while hitch-hiking, while restricting defendant's questions to the issue of consent on those prior occasions).

Woods v. State, 657 P.2d 180 (Okla. Crim. App. 1983). A fifteen-year-old complainant accused her father of incest. *Id.* at 180-81. The appellate court held that the trial court improperly limited cross-examination which was intended to elicit that the complainant had made similar accusations against other family members, who, like her father, had threatened to have her twenty-four-year-old boyfriend prosecuted for statutory rape. *Id.* at 181. The pattern of retaliatory accusations was highly probative as to the complainant's motive to fabricate the charges against her father. *Id.* (Use of the complainant's prior sexual behavior to show bias is discussed *supra* notes 148-235 and accompanying text.)

257. *Hughes v. Raines*, 641 F.2d 790, 792 (9th Cir. 1981) (holding that evidence that the accused in a prior incident denied the charge and that the District Attorney chose not to prosecute is not enough to prove the falsity of the prior charge).

Phillips v. State, 545 So. 2d 221, 224 (Ala. Crim. App. 1989) (ruling that mere dismissal of charges does not establish that they were unfounded).

State v. Hutchinson, 688 P.2d 209, 213 (Ariz. Ct. App. 1984) (finding that a dismissal of the prior charge is not sufficient proof of its falsity and that the intrinsic veracity of the complainant's accusations should not be confused with the inability of the State to meet its burden of proof for a criminal conviction).

People v. Alexander, 452 N.E.2d 591 (Ill. App. Ct. 1983). Evidence of prior rape complaints by the complainant was inadmissible where the only suggestion that they were unfounded was that one prior accusation ended in a finding of no probable cause and the other culminated in two hung juries. *Id.* at 595. The intrinsic veracity of the complainant's accusations should not be confused with the inability of the State to meet its burden of proof for a criminal conviction. *Id.*

State v. Anderson, 686 P.2d 193 (Mont. 1984). In a prosecution for sexual assault of three minor children, the trial court did not err in excluding evidence of a previously dismissed allegation of sexual assault against a third party by one of the victims. *Id.* at 200. There was no competent evidence that the previously dismissed charge was false; indeed, the prosecuting attorney in the prior case testified at a hearing that the charges were dismissed because the victim's mother did not want to subject the victim to the trauma of a trial. *Id.*

State v. Anthony, 365 S.E.2d 195 (N.C. Ct. App. 1988). The court found no error in prohibiting cross-examination of the fourteen-year-old complainant as to her previous claims of abuse by both her natural father and her stepfather. *Id.* at 195. The only evidence as to the falsity of those charges was the complainant's vague statements that the charges had been dismissed. *Id.* at 196.

State v. Kringstad, 353 N.W.2d 302, 311 (N.D. 1984) (holding that the accused's denial, and the fact that the police and courts took no action, did not establish the falsity of the accusation).

Commonwealth v. Brinton, 418 A.2d 734, 736 (Pa. Super. Ct. 1980) (concluding that

Aside from these isolated rulings, the courts have provided little explicit discussion of how persuasive the defendant's proof must be that the prior accusation was a lie. One court has held that it is enough to "produce evidence at the pre-trial hearing [from which] . . . a reasonable person could reasonably infer that the complainant made prior untruthful allegations of sexual assault."²⁵⁸ This is the standard threshold of relevancy.²⁵⁹ The alternative to this is to require the defendant to persuade the judge of the falsity of the complainant's prior rape allegation by a preponderance of the evidence. Suppose, for example, the defendant: (a) offers proof that two years ago the complainant accused *X* of rape; and (b) calls *X* to testify that he did not rape her. *X*'s testimony suffices to satisfy the "reasonable person could reasonably infer" test,²⁶⁰ even if the judge believes the complainant rather than *X*.

In appropriate circumstances, a defendant should be afforded a reasonable opportunity for discovery of evidence as to the falsity of the prior accusation.²⁶¹

there was no abuse of discretion in refusing to allow cross-examination concerning prior rape charges which complainant had brought and subsequently refused to prosecute).

State v. Demos, 619 P.2d 968 (Wash. 1980). The trial court excluded evidence of one prior rape complaint which was not pursued for lack of suspects and the inability of the police to contact the victim, apparently because she had moved. The defendant's challenge to the victim's credibility on the second charge was also excluded because it rested entirely upon inadmissible polygraph evidence, even though no charges were filed as a result of the witness' "consistent deception" during the polygraph examinations. *Id.* at 969-70. The Washington Supreme Court affirmed the trial court's exclusion. *Id.* at 968. The court may have been unduly restrictive with regard to the second complaint. Even though polygraph evidence is inadmissible, it may provide a valid basis to permit defense counsel to question the witness about the underlying incident. *Cf.* FED. R. EVID. 104(a) Advisory Committee's Note (stating that in deciding upon the admissibility of evidence, a judge may consider other evidence which itself is inadmissible).

State v. Williams, 513 P.2d 854, 855 (Wash. Ct. App. 1973) (holding that the trial court properly precluded defendant from cross-examining the complainant regarding a prior rape accusation on which the prosecutor had decided not to proceed).

258. State v. DeSantis, 456 N.W.2d 600, 606-07 (Wis. 1990).

259. See *infra* note 424 (discussing *Huddleson v. United States*, 485 U.S. 681, 690 (1988)). See generally 2 C. FISHMAN, JONES ON EVIDENCE §§ 11:4-11:6 (7th ed. 1994) (discussing relevance, admissibility, and weight of evidence including direct and circumstantial evidence).

260. See generally 1 C. FISHMAN, JONES ON EVIDENCE §§ 3:32-3:33 (7th ed. 1994) (discussing inferences and witness credibility).

261. *People v. Mikula*, 269 N.W.2d 195, 197-99 (Mich. Ct. App. 1978). Defense counsel stated in a pretrial motion that a police report contained an allegation that the complainant had made a similar charge, some months prior to the alleged incident with the defendant, against a third party who was not prosecuted. *Id.* at 197. Held: the trial court improperly denied defendant's motion to order discovery of the details of the prior incident. *Id.* at 198-99.

3. *Extent of Admissibility*

It is a generally accepted rule of evidence that an attorney seeking to impeach a witness's character for truthfulness may cross-examine the witness about prior, unrelated lies and misrepresentations, but may not offer extrinsic evidence to prove the witness in fact uttered those falsehoods.²⁶² The rules permit these questions to enable counsel to probe a witness's character for truthfulness, but ban extrinsic proof because unrelated falsehoods are collateral to the issues being tried. On the other hand, it is also a generally accepted rule that evidence that a person behaved in an unusual and idiosyncratic manner on a prior occasion is admissible to suggest he or she behaved the same way and with the same state of mind on the similar occasion in question.²⁶³ The issue then is which rule to apply to evidence that on a prior occasion the complainant falsely accused someone of a sex offense.

To falsely accuse a man of rape is quite a different thing than exaggerating one's qualifications on a job application, fudging on a loan application, or the like. A false rape accusation reveals a flaw in character of a particular, and particularly dangerous, kind. Its relevance, in a case where the key question is whether the complainant is lying about rape

262. See, e.g., FED. R. EVID. 608(b), providing:

SPECIFIC INSTANCES OF CONDUCT. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility.

Id. Thus, subject to the judge's discretion and assuming the attorney has a good faith basis to do so, an attorney may ask a witness questions such as, "Did you make false statements on an application for a loan you submitted to the X Bank in May of 1984?" If the witness denies doing so, however, counsel is not permitted to call witnesses or offer documentary evidence corroborating the accusation.

263. See, e.g., FED. R. EVID. 404(b), providing:

OTHER CRIMES, WRONGS, OR ACTS. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Id.

this time, is palpable. Accordingly, although a few courts have held that a defendant may only cross-examine the complainant about prior untrue sex assault allegations,²⁶⁴ the prevailing, and correct, view is that if the complainant denies making the prior accusation or denies that it was false, the defendant may offer extrinsic evidence to establish these facts.²⁶⁵

In rare cases, however, evidence of prior false accusations may have so little probative value that exclusion is justified.²⁶⁶

VI. IMMEDIATELY SURROUNDING CIRCUMSTANCES

The complainant's conduct at or near the time immediately surrounding the alleged offense may be highly relevant on the issues of consent and credibility.²⁶⁷ Some rape shield laws reflect this.²⁶⁸ In other circumstances, however, admission of such evidence would directly contradict

264. *State v. Boggs*, 588 N.E.2d 813, 816 (Ohio 1992) (applying state evidence rule 608B, discussed *supra* note 262); *see also* *People v. King*, 156 Cal. Rptr. 268, 273 (Cal. Ct. App. 1979) (holding that cross-examination of complainant's prior accusations was correctly restricted to the issue of consent); *Woods v. State*, 657 P.2d 180, 181-82 (Okla. Crim. App. 1983) (suggesting that the defendant is restricted to cross-examining the complainant to prior false accusations and may not offer extrinsic evidence to rebut a denial). Other aspects of *King* and *Woods* are discussed *supra* note 256.

265. *People v. Wall*, 157 Cal. Rptr. 587, 591 (Cal. Ct. App. 1979) (admitting such evidence of complainants non-sexual conduct to prove truthfulness or untruthfulness).

People v. Gorney, 481 N.E.2d 673 (Ill. 1985) (recognizing the rule, but holding that it was not error to exclude the evidence in this case).

People v. Mikula, 269 N.W.2d 195 (Mich. Ct. App. 1978) (allowing the defendant to put forth evidence of complainant's truthfulness or untruthfulness).

Miller v. State, 779 P.2d 87, 90 (Nev. 1989) (ruling such extrinsic evidence is only admissible if the complainant denies making the prior accusation).

Clinebell v. Commonwealth, 368 S.E.2d 263 (Va. 1988) (holding that where the complainant denies making the prior accusation, the defendant may offer proof).

266. *Commonwealth v. Gaddis*, 639 A.2d 462, 466-67 (Pa. Super. Ct. 1994) (holding that the probative value of complainant's false accusation was negligible because of the "horrific sexual, physical and emotional abuse" exhibited by the defendant upon the complainant, his minor daughter, and the fact her testimony about frequent sexual abuse was corroborated by the testimony of her mother, brother and sister).

267. Such evidence is sometimes relevant with regard to physical evidence offered by the prosecutor. *See supra* note 80.

268. *See, e.g.*, ARK. CODE ANN. § 16-42-101(c) (Michie Supp. 1994) (authorizing the judge to admit "evidence directly pertaining to the act" in question); MO. ANN. STAT. §§ 491.015.1.(3) and .2 (Vernon Supp. 1994) (authorizing admission of "[e]vidence of immediate surrounding circumstances of the alleged crime" if, after an *in camera* hearing, the judge finds the evidence "relevant to a material fact or issue").

FED. R. EVID. 412(a) excludes "evidence offered to prove that any alleged victim engaged in *other* sexual behavior." The Advisory Committee's Note to the 1994 amendments commented, "The word 'other' is used to suggest some flexibility in admitting evidence 'intrinsic' to the alleged sexual misconduct." FED. R. EVID. 412(a) Advisory Committee's Note.

the principles underlying rape shield legislation, and hence, courts should exclude it.

A. Complainant's Attire

The issue of whether a defendant should be permitted to elicit testimony as to how the complainant was dressed at the time in question remains controversial. Florida's statute prohibits "... evidence presented for the purpose of showing that manner of dress of the victim at the time of the offense incited the sexual [assault]" ²⁶⁹ The Advisory Committee Note to the 1994 Amendment to FRE 412 observes that evidence of the complainant's "mode of dress" is inadmissible unless the evidence relates to prior conduct with the defendant on the issue of consent. ²⁷⁰ Georgia's statute also excludes evidence of the complainant's "mode of dress," ²⁷¹ but Georgia's Supreme Court has held its rape shield law does not exclude evidence offered to impeach the victim's direct testimony as to how she was dressed. ²⁷² This result is not necessarily inconsistent with the intent of the statute.

A court should exclude evidence of how the complainant dressed on other occasions, barring some showing of special relevancy. ²⁷³ An absolute ban on evidence of how the complainant dressed on the occasion in question, however, goes too far. A woman who dresses in an overtly sexual and provocative manner presumably wishes to draw attention to her sexual attractiveness. ²⁷⁴ This, of course, does not mean that she is willing to have sex with the man (or any man) she hopes or happens to attract. But, depending on circumstances, it may have a legitimate tendency to suggest willingness. On the one hand, evidence that Ms. A dressed provocatively while accompanying her husband to a night at the theater is virtually irrelevant if offered to suggest that she sought sexual advances from other men, let alone that she consented to have sex with a stranger who accosted her in an alcove during intermission. Ms. B's decision, on

269. FLA. STAT. ANN. § 794.022(3) (West Supp. 1995).

270. FED. R. EVID. 412(a) Advisory Committee's Note.

271. GA. CODE ANN. § 24-2-3(a) (1982) (including within the definition of excluded "past sexual behavior," evidence of "the complaining witness[s] . . . mode of dress . . .").

272. *Villafranco v. State*, 313 S.E.2d 469, 474 (Ga. 1984). The court held that, where the state introduced into evidence the underpants the complainant claimed to have been wearing the night she was raped, it was error to exclude the testimony of a female co-worker stating that earlier in the day the complainant boasted that she was not wearing underwear. *Id.* "The rape shield law is not applicable to evidence offered to impeach the prosecution's principle witness as to her mode of dress at the time in question." *Id.* at 474.

273. Such evidence might merit admission if it fits within evidence of a particular pattern of sexual behavior. *See generally infra* notes 320-48 and accompanying text.

274. To coin a universally acceptable definition of "sexually provocative clothing" is, of course, impossible; provocation, ultimately, is in the eye of the beholder.

the other hand, to wear a micro-miniskirt and a see-through blouse for a night of singles bar hopping will be perceived by many men (and women) as indicating receptiveness to a casual sexual encounter. Moreover, unless she was remarkably naive, Ms. *B* must have known this as well. Does not her willingness to send that signal in such a setting have some tendency to suggest that the signal was accurate? And if she accepts an invitation to visit a new acquaintance's apartment to look at his goldfish, is not her provocative costume relevant in assessing whether she consented to the sexual advance that immediately followed the feeding of the goldfish?²⁷⁵

B. Conduct With the Defendant

Evidence that the complainant demonstrated affection for the defendant or behaved in a sexually provocative or inviting manner toward him shortly preceding the alleged rape supports the inference that she consented to sex with him later, and should therefore be admitted.²⁷⁶ Of course, if a woman invites or allows the defendant physical contact somewhat more intimate than a handshake, it does not necessarily follow that she also consented to intercourse. "All or nothing at all" is not an iron-clad rule of inter-gender behavior.²⁷⁷ Still, such evidence meets the test of relevance: it makes her subsequent consent more probable than it would be without the evidence. A court must trust the jury's common sense to evaluate it for what it is worth. Moreover, such evidence is not evidence of "*prior* sexual behavior," rather it constitutes an important part of the events in question. Finally, because it involves behavior with the defendant, it falls within that commonly recognized exception to the rape shield exclusionary rule.²⁷⁸

275. To belabor what I hope is obvious, I am *not* saying that a woman who dresses provocatively is "asking for it" or is to blame for "provoking" a man to rape her. The law, and society, must recognize that a woman always has the right to say no and that a man never has the right to ignore her when she says no. But on the factual question, "*Did* she say no," how she was dressed is sometimes a highly relevant consideration.

276. *Massey v. Commonwealth*, 337 S.E.2d 754, 755-59 (Va. 1985). Testimony of witnesses that the complainant attended a dance with the defendant on the night of the alleged rape and spent most of the evening dancing with him, sitting on his lap and kissing him was relevant to victim's consent and credibility. It was therefore error to exclude it. *Id.* at 759.

277. The norm in the paleolithic era of my courtship days (the 1960s) was that as a couple got to know and like each other better, physical intimacy would intensify gradually over time—measured in weeks and months, not minutes. I hope, despite the impression one receives from movies, TV, and the like, that this still is the norm.

278. See *supra* part III (prior sexual relationship with the defendant).

C. Discussion of Complainant's Prior Sexual Behavior

Application of rape shield legislation can pose problems when a defendant seeks to testify that the complainant discussed her sex life with him shortly before the alleged rape. Verbal foreplay that explicitly invites a sexual advance—"my boyfriends do a lot for me . . . , I can get any man I want . . . if I'm in the mood, and I just so happen to be in the mood"²⁷⁹—is clearly relevant on the issue of consent. This evidence, therefore, must be admitted even though it also portrays the complainant as promiscuous.

When the complainant's words are not so clearly inviting, a court is faced with more difficult questions. Two Missouri decisions illustrate this point. In *State v. Gibson*,²⁸⁰ the trial court permitted the defendant to testify that the complainant told him, while she was with him at the time of the alleged kidnapping and rape (between 11:15 p.m. and 1 a.m.), that she was having sexual problems with her boyfriend,²⁸¹ but precluded defendant from offering evidence that the complainant had told the attending physician and the nurse who examined her after the alleged rape that she had sexual relations with her boyfriend at approximately 10:30 p.m.²⁸² The trial court also forbade the defendant from examining the boyfriend as to whether any argument had occurred with the complainant earlier in the evening.²⁸³ The state supreme court reversed, holding that the evidence fell within the state statute's "immediate surrounding circumstances" exception.²⁸⁴ Moreover, the court agreed with the defendant's contention that the evidence was highly relevant to show the complainant's motive—her motive to have sex, to falsely accuse him of rape, and to go to a hospital (fear of pregnancy)—and to corroborate the general credibility of his testimony.²⁸⁵ The court stated:

[T]he proffered evidence . . . was "evidence of immediate surrounding circumstances" and . . . was highly probative of the issue of consent and appellant's mental state. [R]ape cases generally turn upon whom a jury believes. Here evidence tending to corroborate appellant's testimony came from the complainant's own mouth within two or three hours of the alleged rape. The evidence was not offered to show a general inclination to

279. *State v. Calbero*, 785 P.2d 157, 159 (Haw. 1989) (holding it was error to exclude testimony that the complainant said this to the defendant just before he fondled and undressed her).

280. 636 S.W.2d 956 (Mo. 1982).

281. *Id.* at 958.

282. *Id.* at 958-59.

283. *Id.* at 959.

284. *Id.*

285. *Id.* at 958-59.

have a sexual experience, but, rather to prove a specific motive. That it may have been inflammatory is outweighed by the fact that this evidence was extrinsic to appellant's own testimony, tended to corroborate that testimony and concerned statements and sexual acts that occurred in very close temporal proximity to the alleged rape. The statement to the physician was the single shred of evidence available to appellant that came from a third party, one who had no apparent reason to lie, and this evidence was part of the immediate surrounding circumstances.²⁸⁶

In *State v. Madsen*,²⁸⁷ by contrast, the same court held that the "surrounding circumstance" exception to the rape shield statute did not entitle a defendant to testify that the complainant discussed her sexual activity with him before and after they had intercourse, including the facts she was living with one man, regularly seeing another, and had two children who were fathered by yet different men.²⁸⁸ The court distinguished *Gibson* because in this case the complainant's sexual promiscuity with other men did not "surround" the alleged assault.²⁸⁹ At least one other court also has categorically rejected such evidence.²⁹⁰

The result in *Madsen* is problematic because the court apparently gave no consideration to the reasonable argument that a woman's discussion of her sexual exploits with a new acquaintance²⁹¹ may be a form of verbal foreplay intended to encourage a sexual response.²⁹² Yet, it must also be cautioned that broad acceptance of this argument could undermine much

286. *Id.* at 959. On retrial, the prosecutor, during jury selection, asked the panel, "would [you] give the victim's testimony any less weight or tend to disbelieve her solely for the fact that she will admit she had intercourse with her boyfriend before this alleged rape took place?" Following his second conviction, an intermediate appellate court rejected defendant's objection that this was tantamount to instructing the jury to disregard evidence specifically ruled relevant by the state supreme court. *State v. Gibson*, 684 S.W.2d 413, 415 (Mo. Ct. App. 1985).

287. 772 S.W.2d 656 (Mo. 1989).

288. *Id.* at 663.

289. *Id.* at 661.

290. *Logan v. State*, 442 S.E.2d 883, 885 (Ga. Ct. App. 1994). In holding that the rape shield law pre-empts all other rules of evidence, including the "res gestae" rule, Georgia's intermediate appellate court upheld the exclusion of the defendant's testimony. The defendant alleged that the complainant, a white, told him, an African-American, that she had been involved with several African-American men, had given birth to children by different African-Americans, and that her husband had left her because of these involvements. *Id.*

291. *Madsen*, 772 S.W.2d at 658. *Madsen* claimed he picked up the complainant late at night in the parking lot of a combination pool hall/bar; the complainant claimed he forced her into his car at knife point as she walked along a country road. *Id.*

292. The opposite is also true: complainant might have said what she said (if she said it at all) in an effort to dissuade the defendant from raping her—"Please don't—I'm so messed up already, I'm living with one guy and seeing another and my two kids have different fathers"

of what rape shield legislation is designed to achieve.²⁹³ To illustrate, a rapist who, after his arrest, learns about his victim's past sexual behavior, could falsely claim she boasted to him about her sexual exploits while consenting to having sex with him, and then offer evidence of her promiscuity to corroborate his testimony about the conversation and, circumstantially, that she consented to have sex with him.

Statements by the defendant about the complainant's prior sexual conduct may also have special relevancy that justifies admission.²⁹⁴

D. Conduct With Others; Public Conduct

A court should exclude evidence that the complainant indicated sexual interest in another man shortly before the defendant allegedly raped her.²⁹⁵ The inference that interest in sex with one man equals interest in sex with any man is precisely the inference that rape shield statutes re-

293. See, e.g., *Wood v. State*, 736 P.2d 363, 365 (Alaska Ct. App. 1987). Contradicting the complainant's testimony that her prior relationship with the defendant had been a platonic friendship, the defendant testified that it had been intensely sexual. *Id.* at 364. As corroboration, the defendant offered evidence that the complainant had told him she had performed in pornographic movies and had posed nude for Penthouse and had shown him the magazine in which she had appeared. *Id.* at 365. Held: the trial judge properly excluded the evidence, which "could have added little on [the issue of whether the prior relationship had been sexual] except by implying that M.G. was likely to have formed a sexual relationship with Wood because she was, by character, a promiscuous woman," precisely the inference forbidden by the rape shield statute. *Id.* The court also rejected, as unpersuasive and "attenuated," the related argument that M.G.'s willingness to discuss her prior sexual conduct with the defendant suggested a willingness to have a sexual relationship with him. *Id.* at 366. Noting that the trial court permitted Wood to offer "other, more direct evidence corroborating his characterization of the relationship," the appellate court concluded that, "[o]n balance, it is apparent that the realistic impact of the excluded evidence . . . could only have been to impress the jury with the fact that the complaining witness was a person of questionable morals and character." *Id.*

See also *Commonwealth v. Reed*, 644 A.2d 1223 (Pa. Super. Ct. 1994). Defendant was accused of indecent assault on his son's fourteen-year-old ex-girlfriend. *Id.* at 1224. To support his claim that he should be convicted of only corrupting a minor because she consented to the sexual behavior (which did not involve penetration), he sought to cross-examine her as to whether, while he was driving her home, she told him she had engaged in intercourse on several occasions with his son. *Id.* at 1229-30. The appellate court held it was error to preclude the cross-examination. Whether the complainant said that she had had intercourse with defendant's son was relevant on the question of defendant's state of mind at the time. *Id.* at 1230-31. The court emphasized, however, that on retrial it would be improper to allow either side to introduce evidence as to whether or not the complainant had *in fact* had intercourse with defendant's son. *Id.*

294. *Stephens v. Miller*, 13 F.3d 98 (7th Cir.), cert. denied, 115 S. Ct. 57 (1994). See *supra* notes 202-12.

295. One reason to exclude such evidence, although not often mentioned in the literature, is that it is too easy for an unscrupulous defendant to manufacture, i.e., simply produce a friend to testify that complainant propositioned him earlier that day or evening.

ject.²⁹⁶ At the other extreme, courts generally recognize that a defendant should be permitted to offer evidence that shortly before the alleged rape, the complainant engaged in conduct that clearly demonstrated she was generally looking for a sexual encounter without caring who the partner would be.²⁹⁷ The following cases in Georgia, New Hampshire and Michigan illustrate the issues and difficulties in deciding what kinds of behavior fall within this exception to the rape shield exclusionary rule.

In *Villafranco v. State*,²⁹⁸ three teenage boys were charged with raping the complainant, whom they had met for the first time when she voluntarily got into their car and asked them to take her to a party.²⁹⁹ Two acquaintances, who had attempted to dissuade the complainant from going with the boys, testified at a rape shield hearing that a few minutes before encountering the defendants, the complainant, after drinking steadily for

296. Consider, for example, *Ellis v. State*, 353 S.E.2d 822, 825 (Ga. Ct. App. 1987). Charged with being one of five men who raped the complainant, the defendant sought to testify that earlier in the evening, he and a codefendant double-dated with the complainant and another woman. The defendant stated that the other woman engaged in oral sex with him in the front seat of a car while complainant and codefendant were engaging in sexual conduct in the back seat. *Id.* The court excluded the evidence, holding, in essence, that these allegations, even if true, did not create an inference that the complainant would thereafter consent to sex with the defendant, let alone with four other men as well. *Id.* The court also commented on the overwhelming evidence proving that the complainant had in fact been forced by the five men.

Accord Moore v. State, 395 S.E.2d 13, 14 (Ga. Ct. App. 1990) (evidence that complainant propositioned two of the defendant's acquaintances on the night of the alleged rape properly excluded); *State v. Salkil*, 659 S.W.2d 330, 333-34 (Mo. Ct. App. 1983) (evidence that on two prior occasions complainant resorted to extramarital relations after arguments and separations from her husband was not admissible on the issue of consent under the "immediate surrounding circumstances" provision of the state statute); *State v. Cervantes*, 881 P.2d 151, 152 (Or. Ct. App. 1994) (evidence that, just before the rape, the complainant was seen "hanging all over" another man was not admissible to suggest another source for the state's medical evidence of rape); *Commonwealth v. Folino*, 439 A.2d 145, 149-50 (Pa. Super. Ct. 1981) (holding evidence that the complainant had solicited sex from another man prior to meeting defendant was properly excluded).

See also Bobo v. State, 589 S.W.2d 5, 8 (Ark. 1979) (applying the state rape shield statute, which authorized the judge to admit "evidence directly pertaining to the act" in question). Complainant alleged that she was raped by several students in an university athletic dorm. *Id.* at 6. Held: the trial judge properly admitted evidence of her prior sexual relations with two of the men involved and evidence that she consented to have sex with a third man in the same room earlier in the evening wherein the subsequent rape allegedly occurred; and properly excluded evidence of her prior sexual relationship with that third man, as well as evidence that over the previous months she had consented to sex with numerous other men. *Id.* at 8.

297. "[S]tatements in which the victim [sic] has expressed an intent to have sex with the first person encountered on a particular occasion might not be excluded without violating the due process right of a rape defendant seeking to prove consent." FED. R. EVID. 412 Advisory Committee's Note.

298. 313 S.E.2d 469 (Ga. 1984).

299. *Id.* at 469-70.

several hours, approached a stranger in a motel parking lot, asked him to take her to a party, and announced, "I want to . . . get me some nookey."³⁰⁰ Georgia's Supreme Court properly held that exclusion of this testimony was reversible error:

[T]his statement was not inadmissible as evidence of past sexual behavior but was admissible as evidence of existing motive and state of mind. [T]he statement was made very shortly before [the complainant] encountered the defendants . . . [and] there is substantial evidence that during the brief time which elapsed [complainant's] desire to go to a party was continuous.³⁰¹

In *State v. Colbath*,³⁰² the defendant offered evidence that in the hours before the complainant voluntarily left a bar and accompanied him to his trailer, she directed sexually provocative behavior toward several men, "hanging all over" and "making out with" several of them, particularly the defendant (according to a female witness).³⁰³ Indeed, the complainant admitted she "had engaged in close physical contact with at least one man besides the defendant" in the bar.³⁰⁴ New Hampshire's Supreme Court, per then state Justice Souter, held that exclusion of this evidence violated the defendant's constitutional rights to present relevant evidence and confront his accuser.³⁰⁵ The court particularly stressed the public³⁰⁶ and apparently indiscriminate nature³⁰⁷ of the complainant's conduct and the close proximity in time between that conduct and the alleged rape,³⁰⁸ in conjunction with evidence suggesting a reason why the complainant might falsely accuse the defendant.³⁰⁹

300. *Id.* at 470 n.2.

301. *Id.* at 473.

302. 540 A.2d 1212 (N.H. 1988).

303. *Id.* at 1213.

304. *Id.* at 1213, 1215. The quoted language is the court's, not the complainant's or the woman witness'.

305. *Id.* at 1217.

306. *Id.* at 1216-17. "[E]vidence of public displays of general interest in sexual activity can be taken to indicate a contemporaneous receptiveness to sexual advances that cannot be inferred from evidence of private behavior with chosen sex partners." *Id.* at 1216.

307. *Id.* at 1216-17. "[T]he jury could have taken evidence of the complainant's openly sexually provocative behavior toward a group of men as evidence of her probable attitude toward an individual within the group." *Id.* at 1217.

308. "Evidence that the publicly inviting acts occurred closely in time to the alleged sexual assault by one such man could have been viewed [by the jury] as indicating the complainant's likely attitude at the time of the sexual activity in question." *Id.*

309. While defendant and complainant were still in his trailer, they were joined unexpectedly by a young woman who lived with the defendant, who came home at an unusual hour suspecting that the defendant was indulging in faithless behavior. With her suspicion confirmed, she became enraged, kicked the trailer door open and went for the complainant, whom she assaulted violently and dragged outside by the hair. It took the intervention of the defendant and a third

Similarly, in *State v. Ray*,³¹⁰ Missouri's Supreme Court held it was error to exclude evidence that the complainant knowingly thrust herself into a situation where the probability of sexually licentious group conduct was high, because such evidence "supported a finding that . . . the complainant [went] to her . . . alleged assailant's . . . apartment to engage in sexual relations" with whomever might be present.³¹¹

In *People v. Wilhelm*,³¹² by contrast, Michigan's intermediate appellate court held a trial judge properly excluded testimony by the defendant and another witness that the defendant first noticed the complainant (whom he had never met before) in a bar at 1:30 in the morning when she lifted her shirt, exposed her breasts to two men who were sitting at her table,

woman to bring the melee to an end.

Id. at 1212-13. The jury could interpret this attack "as a motive for the complainant to allege rape as a way to explain her injuries and excuse her undignified predicament." *Id.* at 1217.

310. 637 S.W.2d 708 (Mo. 1982).

311. *Id.* at 710. Defendant was accused of being one of four men who raped complainant during the early morning hours of July 19, 1980. *Id.* at 708. Asserting a defense of consent, the defendant offered evidence that during the previous night (July 17-18th), the complainant arrived uninvited at the apartment of one of the men whom she later accused of rape. *Id.* at 710. The defendant offered further evidence that the complainant became extremely intoxicated with alcohol and marijuana; that she was the sole female among five or six men; that the complainant invited one of the men who allegedly raped her on July 19 to engage in sexual relations with her in the bathroom on the night of the 17-18th. The defendant also offered evidence that she refused to engage in sexual relations with a second man; that the complainant subsequently told someone in the group that she had just been raped; and that she was "freaking out" on drugs. *Id.*

Evidence was introduced at trial that in the early evening of July 18-19th, the complainant telephoned the man whom had allegedly raped her the previous night and invited herself to his apartment again. *Id.* The trial court rejected appellant's evidence that this man told the complainant she would be the only woman among four or five men. *Id.* Appellant introduced evidence that the complainant left work on the evening of the alleged rape, because she was too intoxicated on drugs to function. The appellant offered further evidence that (at the scene of the alleged rape) the complainant was seen smoking several "joints" of marijuana, taking valium pills, drinking beer and "chugging" Wild Turkey whiskey. *Id.* The Missouri Supreme Court reversed, holding that the trial court should have admitted appellant's proffered evidence relating to the evening of July 17-18th because it was probative of the issues of the complainant's perception and recollection and her consent. *Id.*

A jury could infer and should have been permitted the opportunity to infer that [because of her extended period of intoxication] the complainant had confused the events and that appellant had never raped her. The evidence also supported a finding that when the complainant responded to her first alleged assailant's telephone caveat that the conditions in his apartment on July 19 would be the same as July 18 by returning uninvited on July 19, she returned to engage in sexual relations.

Id.

312. 476 N.W.2d 753 (Mich. Ct. App. 1991), *cert. denied*, 113 S. Ct. 2359 (1993).

and allowed one man to fondle them.³¹³ Later, the defendant took her to his boat which was parked in his parents' driveway, during which time, according to the complainant, the defendant raped her; according to the defendant, she consented.³¹⁴ The trial court excluded the evidence of her self-exposure in the bar and the appellate court affirmed.³¹⁵ The appellate court rejected *Colbath's* emphasis on the public nature of the complainant's alleged conduct: "We fail to see how a woman's consensual sexual conduct with another in public indicates to third parties that the woman would engage in similar behavior with them."³¹⁶ The court also rejected the defendant's arguments that the complainant's exposure of her breasts in the bar was sexual conduct that involved the defendant (a categorization which would bring it within an exception to the state rape shield law) merely because he observed it. The court stated that "the conduct was clearly directed at the men with whom the victim was sitting."³¹⁷

Wilhelm is distinguishable from *Colbath*, *Roy* and *Villafranco*. In the latter cases, the conduct was directed indiscriminately at several men including the defendant, while the conduct alleged in *Wilhelm* was (at least primarily) directed at only two men, neither of whom was the defendant. But a court should consider the nature of the conduct as well as the number of people with whom the complainant apparently sought to share the conduct. That a couple clung passionately to each other all evening at a dance, and exchanged caresses which might better be saved for a private location, should be considered irrelevant in a prosecution of another man accused of raping the woman later that night, because her affection for her partner is not presumed to be transferrable to other men. If, on the other hand, a woman dances with several men during the course of the evening, groping and being groped by each in turn, this seems highly relevant on the question of whether she consented to have sex with the man from whom she later accepted a ride home—even if he was not one of her dance partners. If a woman in a bar lifts her shirt, exposes her breasts to anyone who cares to look, permits a man to fondle them, and shortly thereafter accepts a ride home from a stranger, does this not suggest a readiness for a casual sexual encounter with that stranger? The Michigan court held that it did not; I am not so sure.³¹⁸

313. *Id.* at 756. No hearing was held on the admissibility of this evidence, so the complainant was never given an opportunity to deny or confirm the allegation.

314. *Id.*

315. *Id.* at 759.

316. *Id.*

317. *Id.*

318. The woman still has the right to say "no" and the right not to be raped. But the

VII. "PATTERN," "PROMISCUITY," "PROSTITUTION"

The basic effect of rape shield legislation is to exclude evidence of the complainant's prior sexual behavior and "alleged sexual predisposition."³¹⁹ Some courts and statutes recognize, however, that evidence of prior sexual behavior may have special relevance if it is sufficiently frequent, unusual, and similar to the defendant's version of the complainant's behavior on the occasion in question.

A. *Pattern; Promiscuity*

Several state statutes authorize a judge to admit evidence of a complainant's prior sexual behavior if it falls into a distinct pattern which elevates its relevance on the issue of consent above the forbidden "yes to some men sometimes means yes to any man anytime" inference. The Florida provision permits admission of such evidence when consent is the issue

if it is first established to the court in a proceeding *in camera* that such evidence tends to establish a pattern of conduct or behavior on the part of the victim which is so similar to the conduct or behavior in the case that it is relevant to the issue of consent.³²⁰

North Carolina's rule permits admission of evidence if the behavior is evidence of a pattern of sexual behavior so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that such complainant consented to the act or acts charged or behaved in such a manner as to lead the defendant reasonably to believe that the complainant consented³²¹

Tennessee's statute has a nearly identical provision.³²² Minnesota's provision recognizes "evidence of the victim's previous sexual conduct tending to establish a common scheme or plan of similar sexual conduct under circumstance similar to the case at issue, relevant and material to the issue of consent"³²³

question is whether her conduct earlier that evening is legitimately relevant on whether she said no and whether the defendant reasonably believed that she was willing.

319. FED. R. EVID. 412 Advisory Committee's Note. "[E]vidence such as that relating to the alleged victim's mode of dress, speech, or life-style will not be admissible." *Id.* The Advisory Committee's Note provides no definition of "life-style." *Id.*

320. FLA. STAT. ANN. § 794.022(2) (West 1994).

321. N.C. R. EVID. 412(b)(3). To secure admissibility, the defendant must move for an *in camera* hearing and persuade the judge that the evidence is "relevant" on the issues of consent or reasonable belief. *Id.* at 412(d).

322. TENN. R. EVID. 412(c)(4)(iii).

323. MINN. R. EVID. 412(1)(A)(i). To secure admission, defendant must move for a

Although the precise language of these provisions varies, the statutes are similar enough so that evidence admissible under one statute is likely admissible under them all. Even in the absence of such a provision, such evidence may have legitimate probative value on the issue of consent exclusive of the forbidden "yes/yes inference," that exclusion of it would deny a defendant his constitutional right to present a defense.³²⁴

The key questions a court must resolve are: (1) how unusual, idiosyncratic, kinky, abnormal, bizarre, or disgusting³²⁵ must the behavior be;³²⁶ (2) how many prior instances must be proved to establish a common scheme or pattern; (3) how closely must the other instances resemble the (defendant's version of the) facts in the instant case; and (4) once the judge has assessed the legitimate probative value of the evidence, how is that value to be weighed against the risk of unfair prejudice? The fourth question has already been addressed;³²⁷ this section of the article focuses on the first three questions.

Evidence that the complainant engaged in occasional, merely fungibly similar conduct does not satisfy the pattern exception.³²⁸ Nor, according

hearing. *Id.* at 412(2). At the hearing, defendant must persuade the judge that the probative value of the evidence "is not substantially outweighed by its inflammatory or prejudicial nature . . ." *Id.* at 412(2)(C).

324. The cases cited *infra* notes 326-46 acknowledge this principle, although generally holding that defendant's evidence does not qualify; see also *United States v. Kasto*, 584 F.2d 268, 271 n.2 (8th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979) (discussing, in dictum, the possible probative value on the issue of consent); *People v. Hackett*, 365 N.W.2d 120, 184 n.4 (Mich. 1984) (discussing, in dictum, the circumstances enhancing the probative value of complainant's past sexual conduct, citing *Kasto*, 584 F.2d at 271 n.2).

325. Attentive readers have no doubt noted that the first two terms in this list of adjectives are value-neutral; thereafter the list grows increasingly judgmental. The list was written thus to remind the reader of an issue that lurks near the surface in these cases. In assessing the legitimate probative value of the evidence and its risk of unfair prejudice, how much (if at all) should a judge consider the extent to which the behavior in question violates contemporary social norms and mores?

326. The Illinois Supreme Court has commented that to find evidence that "fits the 'prior pattern' exception . . . require[s] us to determine that the particular practice was so unusual, so outside the norm, that it had distinctive characteristics which make it the complainant's modus operandi." *People v. Sandoval*, 552 N.E.2d 726, 738 (Ill.), *cert. denied*, 498 U.S. 938 (1990) (holding that anal intercourse does not qualify as a distinctive enough characteristic). This is consistent with the view taken by others. See Tanford & Bocchino, *supra* note 8, at 586-89 (discussing the probative value of sexual habits and arguing that the more unusual a practice is, the fewer the instances are required to be considered a habit); Harriet R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 830-48 (1986) (stating that "pattern" evidence can be probative to the issue of consent if restricted to distinctive circumstances similar to the circumstances of the alleged rape).

327. See *supra* part I.B.3. (discussing relevancy in the context of weighing probative value versus prejudicial effect).

328. One episode of sexual intercourse with another man some time before the alleged assault has been held to not establish a pattern of conduct or behavior. See, e.g., *Hodges v.*

to a Connecticut court, does evidence of a single, somewhat idiosyncratic, somewhat similar episode satisfy the pattern exception.³²⁹ Courts have

State, 386 So. 2d 888, 889 (Fla. Dist. Ct. App. 1980) (three or four weeks earlier); State v. Friend, 493 N.W.2d 540, 545 (Minn. 1992) (two weeks earlier); State v. Booker, 348 N.W.2d 753, 754 (Minn. 1984) (one week earlier); State v. Rhinehart, 316 S.E.2d 118, 119 (N.C. Ct. App. 1984) (earlier that same evening).

Sandoval, 552 N.E.2d at 738. Defendant was accused of anal rape; the complainant testified that she had anal intercourse only twice before with defendant (her ex-boyfriend) and never with anyone else. *Id.* at 728. Held: defendant's proffered evidence that she had also consented to anal intercourse with another man does not fit within the "prior pattern" exception to rape shield statutes. *Id.* at 738.

People v. Paquette, 319 N.W.2d 390 (Mich. Ct. App. 1982), *aff'd sub nom. People v. Hackett*, 365 N.W.2d 120 (Mich. 1984). Held: that the complainant on another occasion met a man in a bar and accompanied him elsewhere for consensual intercourse was inadmissible, where the defendants' version of the incident in question was that complainant instigated simultaneous sexual relations with two strangers in the cab of a pick-up truck. *Id.* at 391-92.

State v. Shoffner, 302 S.E.2d 830 (N.C. Ct. App. 1983). Defendants offered to drive the complainant to the home of a mutual friend, then stopped the car in a wooded area and, according to the complainant, raped her. The defendants insisted she had consented. *Id.* at 831. The court held that the trial judge properly excluded evidence of three incidents during the eighteen months preceding the rape in which the complainant had consensual sex with other men. *Id.* at 832. The court also held, however, that the trial judge erred in excluding other evidence more suggestive of a pattern. *Id.* at 832-33. See *infra* notes 333-35 and accompanying text (discussing *Shoffner* further).

State v. Wilhite, 294 S.E.2d 396 (N.C. Ct. App.), *cert. denied*, 297 S.E.2d 403 (N.C. 1982). Three defendants, two of whom the complainant knew previously, were charged with forcing her to leave a bar and grill early in the morning, and then raping her. *Id.* at 397-98. They claimed her behavior was entirely consensual. *Id.* at 399, 403. The allegation that the complainant left a bar at around 2 a.m. on another occasion with a "perfect stranger" was inadmissible: the latter incident was at most fungibly similar to defendants' version of events, and did not constitute a distinctive pattern nor did it closely resemble defendants' version as required by statute. *Id.* at 400.

State v. Cecotti, 639 P.2d 243 (Wash. Ct. App. 1982). Evidence of complainant's prior sexual relations with two other men was inadmissible, the court concluded, because only in an extreme case of indiscriminately promiscuous conduct could it be argued that past sexual behavior with third persons is even minimally relevant to consent. *Id.* at 246.

State v. Bray, 594 P.2d 1363 (Wash. Ct. App. 1979). Defendant, 38, was charged with forcibly raping a slightly retarded sixteen-year-old female. *Id.* at 1365. The Washington Court of Appeals held that the trial court properly excluded evidence that at age 13, the complainant engaged in sexual intercourse with her adoptive father, without any clearly expressed lack of consent. *Id.* at 1368. The defendant's contention that the complainant's "passive acceptance of an older man's sexual advances on a prior occasion infers passive acceptance of the alleged sexual intercourse with defendant" was highly speculative "absent scientific proof for the proposition that child incest victims tend in adult life to submit passively to sexual advances of older men." *Id.* at 1368.

329. *State v. Cassidy*, 489 A.2d 386 (Conn. App. Ct.), *cert. denied*, 492 A.2d 1239 (Conn. 1985). The complainant testified that after she met the defendant (with whom she had consensual sex on prior occasions) at a bar, accompanied him to his house, undressed and got into bed to have sex with him, he suddenly became abusive, struck her, threatened her, tied her up and raped her. *Id.* at 387-88. The defendant denied threatening or striking her, insisted that she suggested the bondage, and testified that after several rounds of con-

held, however, that a defendant must be permitted to introduce evidence that the complainant had "a distinctive pattern of past sexual conduct, involving the extortion of money by threat after acts of prostitution, of which her alleged conduct in this case was but an example . . ."³³⁰; that a defendant must be permitted to cross-examine the complainant concerning a pattern of consensual intercourse with men she barely knew in furtherance of her attempt to run away from home;³³¹ and that a defendant must be allowed to elicit complainant's acknowledgment that her addiction to crack-cocaine had, on numerous occasions, caused her to engage in sex in exchange for crack.³³²

Where the alleged pattern does not involve a motive extrinsic to sexual activity such as money (extortion), a desire to escape an unpleasant home, or drugs, it is difficult to define the degree of similarity or abnormality required to qualify as a pattern. Logic suggests that the more unusual or inherently unlikely the defendant's version of events is, the greater the probative value that the complainant engaged in similar conduct on other occasions.

Cases from North Carolina and Washington illustrate the difficulties in applying such a standard. In *State v. Shoffner*,³³³ the defendants testified that the complainant had initiated the sexual encounter by going to their apartment, unzipping the trousers of one defendant, fondling him, sug-

sensual sex the complainant suddenly became hysterical, screamed something about her husband who had been killed in Vietnam, said that she "shouldn't be doing this" and wanted to be with her husband, and began striking the defendant. *Id.* at 388. To bolster his version of events, defendant sought to have another man testify that about a year before the night in question, the complainant had taken him to her home, where, after consensual sex, she began "going crazy" and screaming about her husband who was killed in Vietnam. *Id.* at 378-79. The appellate court affirmed the trial judge's exclusion of this testimony, holding that a single somewhat similar episode one year earlier was not enough to establish a pattern, "[p]articularly since there was also evidence of more recent nights which the defendant and the victim had spent together with no similar behavior by her" *Id.* at 391.

330. *Winfield v. Commonwealth*, 301 S.E.2d 15, 20 (Va. 1983) (noting that evidence that the complainant was a prostitute, without more, does not suffice). Virginia's rape shield law does not have a "pattern" or "common scheme" provision. It does, however, permit a defendant to offer evidence, including evidence of her sexual behavior with others, that the complainant had "a motive to fabricate the charge." VA. CODE ANN. § 18.2-67.7(B). The Virginia Supreme Court held that evidence of a pattern of similar extortionate conduct in the past should be admitted to prove her motive in accusing the defendant. *Winfield*, 301 S.E.2d at 20. It is unclear whether the court would consider one such similar incident to be enough to constitute a "pattern." *Id.* at 20-21.

331. *State v. Vaughn*, 448 So. 2d 1260, 1262 (La. 1983) (reversing defendant's conviction).

332. *Johnson v. State*, 632 A.2d 152, 161 (Md. 1993) (evidence of complainant's admission of exchanging sex for drugs on prior occasions admissible).

333. 302 S.E.2d 830 (N.C. Ct. App. 1983).

gesting that he, the codefendant, and others have an orgy, and then directing him to drive to a certain location before having sex with them both. A North Carolina appellate court held that it was error to reject evidence of conduct on other occasions that suggested the complainant "was the initiator, the aggressor, in her sexual encounters."³³⁴ Although the other incidents involved her behavior at clubs and parties the court stated, "[w]e do not believe the Rape Victim Shield Statute requires the prior sexual behavior of a complainant to parallel on all fours a defendant's version of the prosecuting witness's sexual behavior at the time in question."³³⁵

This should be contrasted with a Washington case, *State v. Hudlow*.³³⁶ The defendants saw the complainants hitchhiking during the early morning, offered them a ride, drove to an isolated location; and, according to the complainants, raped them at knife point. The defendants maintained that the complainants directed them to the location, initiated the sex, and willingly changed partners during the episode. At a pretrial hearing, the defendants called a sailor, who testified that he had engaged in oral sex with both women on a number of occasions, had sexual intercourse with one of the women at least twice and with the other woman more often although not on a regular basis. In addition, the sailor participated and witnessed them having "group sex" with one or two men at a time, and that one woman had admitted to engaging in sexual intercourse with numerous other sailors.³³⁷ The trial court excluded this evidence; an inter-

334. *Id.* at 832-33. The appellate court held that the trial court erred in rejecting the following evidence: (1) A woman testified that she had observed the complainant many times at a club, " 'attracting some of the men,' dancing with them, and getting out of control by 'feeling on them and stuff like that . . . [Her] hands [would be] every which way on the man's body.' " *Id.* at 832; (2) The older brother of one of the defendants testified that about eighteen months before the alleged rape, the complainant approached him and told him to come by her house later that night. *Id.* When he did so, she got in his car clad only in a gown without underclothes and had intercourse with him in the car. *Id.*; (3) A third witness testified that he had observed the prosecuting witness seated on a "soda crate" in the Circle Inn with two men standing in front of her, one of whom was zipping his pants. *Id.*

335. *Id.* at 833. The court explained:

The evidence excluded suggests that the prosecuting witness's *modus operandi* was to accost men at clubs, parties (public places) and make sexual advances by putting her hands "all over their bodies." Defendants contend that the prosecuting witness's sexual behavior on 20 November 1981—fondling their genitals, trying to get them to engage in an orgy, and telling them where and when to stop the car—was no different from the prosecuting witness's pattern of sexual behavior.

Id.

336. 659 P.2d 514 (Wash. 1989).

337. *Id.* at 517. The court used fictitious names to protect the complainants' true identities, although it noted that they were known locally as Sunshine and Moonshine. *Id.* at 516.

mediate appellate court reversed. The Supreme Court of Washington, after considering both statutory and constitutional arguments favoring admissibility, reversed and reinstated the convictions. The court ruled that the proffered evidence

concerned only the general promiscuity of the two victims and lacked further indicators showing any past consensual sexual activity comparable to the story offered by respondents . . . For instance, no testimony was offered showing that the two women had ever engaged in sex with men other than sailors whom they knew or that they had sexual relations with men who had picked them up hitchhiking. Such evidence would have had greater value in aiding the jury to predict whether consent was given in this case. Without such particularized factors, however, the relevancy of the evidence was limited at best.³³⁸

Hudlow's insistence on precise parallels between the prior episodes and the defendant's version of events reflects the prevailing attitude. Although a number of courts have commented in dictum that it would suffice to show that the complainant regularly has sex with men she meets in bars or parking lots,³³⁹ courts generally have excluded evidence of promiscuity, even promiscuity of a highly nonselective, indiscriminate kind.³⁴⁰ For example, although there is a tendency in multiple defendant

338. *Id.* at 523.

339. *State v. Fortney*, 269 S.E.2d 110, 116-17 (N.C. 1980).

If the defendant had shown that the victim commonly accosted strangers in parking lots seeking sexual partners or that she often met men in apartment parking lots and took them to her car for sexual congress, then clearly the relevance of such evidence is established under the statute and would have been admissible.

Id.

State v. Hudlow, 659 P.2d 514, 523 (Wash. 1980) (*see supra* notes 55-57, 336-48 and accompanying text, and *infra* notes 378-85 and accompanying text). The Washington Supreme Court, citing the state's rape shield law, commented that evidence establishing "a pattern of indiscriminate consent to sexual activity" might have sufficient relevance "as to be [legitimately] helpful in predicting whether there was consent in [a particular] case." *Hudlow*, 659 F.2d at 523 (citing WASH. REV. CODE § 9A.44.020(3) (1993) and WASH. R. EVID. 403). The court added:

[I]f a complaining witness frequently engages in sexual intercourse with men shortly after meeting them in bars, this would have some relevancy if the defendant claims she consented to sexual intercourse with him under similar circumstances. Such a particularized factual showing would demonstrate enough similarity between the past consensual sexual activity and defendant's claim of consent that it would have the necessary predictive value required by [WASH. R. EVID.] 401. Nevertheless, this evidence may be so slightly relevant in comparison to its prejudicial effect that it may not be admitted into evidence.

Id. at 520.

340. *Bobo v. State*, 589 S.W.2d 5, 8 (Ark. 1979). Complainant alleged that she was raped by several men in a university athletic dormitory. *Id.* at 6. Held: the trial judge properly admitted evidence of her prior sexual relations with two of the men involved and

cases to admit evidence that the complainant consented to prior acts of group sex if a defendant was a participant in both the prior consensual episode and the one giving rise to rape charges,³⁴¹ courts generally exclude evidence of the prior episode if there is no common male participant.³⁴²

Some of these decisions raise the troubling question of whether the law has shifted too far in the correct direction. In *Hudlow*, for example, excluding evidence concerning the complainants' past sexual conduct would leave the jury with the impression that the complainants' attitudes toward sex lie somewhere on the spectrum of what may be considered "normal."³⁴³ Because "normal" women do not invite total strangers to have group sex with them in a car after an acquaintance of just a few minutes, the complainants' accusation of rape is inherently believable and the defense of consent is inherently incredible. If, on the other hand, the

evidence that she had consented to have sex with a third man in the same room earlier in the evening wherein the subsequent rape allegedly occurred; and properly precluded defendants from cross-examining her as to whether she had previously consented to sex with fifteen other men. *Id.* at 8.

Capps v. State, 696 S.W.2d 486 (Tex. Ct. App. 1985). The complainant accused the defendant of going to her trailer, dragging her out by her hair, threatening to kill her, driving her to his home, threatening her with a gun, and raping her. The defendant denied that he forced or threatened her and claimed she consented. *Id.* at 487. The Texas Court of Appeals held the trial judge properly excluded a defense witness's testimony that she and the complainant had engaged in "sex parties," including switching partners and group sex, the most recent only four months before the alleged rape, photographs of which complainant kept in an album; this was not sufficiently similar to the events underlying the rape charge to justify admissibility to prove consent. *Id.* at 490.

Although neither the Arkansas nor Texas rape shield law contains a "pattern" or "common scheme" provision, in each case the court discussed whether the evidence had sufficient relevancy beyond the forbidden inference to qualify for admission. ARK. CODE ANN. § 16-42-101 (Michie 1994); TEX. PENAL CODE ANN. § 22.011 (West 1994).

The Texas Penal Code permits a defense, in prosecutions for sex offenses not involving force against a child aged fourteen or older, that the child was sexually promiscuous. TEX. PENAL CODE ANN. § 22.011(d)(1) (West 1994). Accordingly, the evidentiary rules of Texas permit a defendant charged with such a crime to offer such evidence. TEX. R. CRIM. EVID. 412(e) Texas courts have held that "[p]romiscuity" does not refer to an isolated incident of sexual relations with one particular person, but denotes an indiscriminate grant of physical favors to persons of the opposite sex without any requirement of love." *Ramos v. State*, 819 S.W.2d 939, 941 (Tex. Ct. App. 1991). The evidence must relate to the complainant's conduct prior, but not subsequent to, the alleged offense. *Rankin v. State*, 821 S.W.2d 230, 234 (Tex. Ct. App. 1991); see *Hernandez v. State*, 754 S.W.2d 321, 327 (Tex. Ct. App. 1988) (giving an example of evidence of a pattern of promiscuity sufficient to merit its admission to prove consent).

341. See *supra* part III.B.4.

342. See *Hudlow*, 659 P.2d at 514; see also *Capps*, 696 S.W.2d at 486.

343. *Hudlow*, 659 P.2d at 516-23. The jury may have received the impression that the complainants were naive, inexperienced school girls. See *supra* notes 378-85 and accompanying text.

sailor's testimony and other evidence of the complainants' licentiousness³⁴⁴ was true, the defendants' story would arguably become credible. And if this is so, should not the defendants have a constitutional right to introduce this evidence? Washington's Supreme Court disagreed, because the facts as alleged by the defendants were not a perfect match for the complainants' alleged idiosyncracies—the defendants were strangers from whom they hitchhiked a ride early one morning, not sailors with whom the complainants were casually acquainted.³⁴⁵

Query whether this difference is significant enough to justify exclusion. Rape shield legislation rejects the "yes/yes inference" in significant part because it is often inaccurate. A woman's decision to have sex with a man is understood to be a personal, private, intimate *choice*, based at least in part on the characteristics of the man involved. A woman's choice to have sex with *X* on a particular occasion says very little about whether she is likely to agree to have sex with *Y* on a different occasion. A history of behavior such as that alleged of the complainants in *Hudlow* and *Shofner*, however, suggests something very different, i.e., an abnormal compulsion³⁴⁶ to engage in sexual activity for its own sake with comparatively little regard for the characteristics of the man or men involved. This condition has probative value in helping a jury decide whether the complainant consented on the occasion in question. And if a woman's embrace of prodigious promiscuity is accepted as a conscious, rational choice, rather than an abnormal compulsion—well, choices may have consequences. One consequence is that a jury may be skeptical of her testimony that on a particular occasion she did not consent.

On the other hand, to admit evidence of the complainants' promiscuity in *Hudlow* would have created the risk that the jury might acquit because, despite being convinced that the complainants did not consent this

344. *Hudlow*, 659 P.2d at 516-17. At the hearing in *Hudlow*, the sailor also related several hearsay statements of other men who professed to have had sexual relations with the complaining witnesses, and testified that he and his roommates rated the complainants' respective performances in oral-genital sex, rating one the better of the two. *Id.* at 517. The sailor also testified that he had been told that the complainant who had won the higher ratings tutored the other complainant in oral sex to help her improve her technique. *Id.* The state supreme court, correctly, held that the trial court had properly rejected this testimony as inadmissible hearsay. *Id.* Query, however, whether exclusion would have been proper if other witnesses were prepared to testify (truthfully, let us assume) to these facts from first-hand knowledge. Evidence of the "rating system," in and of itself, would of course be inadmissible on grounds of irrelevance, but the complainants' reaction to it, if true, is highly relevant to their attitudes about sexual activity.

345. *Id.* at 520.

346. The words "abnormal compulsion" reflect my assumption, shared, I have no doubt, by the vast majority of people, that a woman who regularly comports herself as the complainants in *Shoffner* and *Hudlow* allegedly did is emotionally ill.

time, the jurors would believe the complainants "deserved what they got"; or because the jury would be unwilling to ruin the defendants' lives to protect women whom they perceived to be corrupt or immoral. Either result would be improper. But equally improper is the conviction of the defendants, however contemptible their own conduct,³⁴⁷ if in fact they did not rape the complainant.³⁴⁸

B. Evidence Relating to Prostitution

1. Admissibility

Courts often express the view that, absent additional circumstances, evidence that the complainant engaged in prior acts of prostitution³⁴⁹ is not admissible as proof that she consented to sex with the defendant on the occasion in question.³⁵⁰ Even prior convictions for prostitution generally

347. To exploit an emotionally unstable woman's sexual vulnerability is a cruel and contemptible act. But unless the law has certified her as incapable of giving lawful consent, such exploitation is not a crime.

348. The dilemma posed was aptly summarized by Susan Estrich, a leading proponent of the reforms that have changed the law of rape:

Many of the traditional rules of rape liability were premised on the notion that women lie; Wigmore went so far as to view rape complainants as fundamentally deranged. I don't buy that for a moment Yet even if only one of a hundred men, or one of a thousand, is falsely accused, the question is still how we can protect that man's right to disprove his guilt. Assume for a moment . . . that it was you, or your brother, or your boyfriend or your son, who was accused of rape by a casual date with a history of psychiatric problems, or by a woman he met in a bar who had a history of one-night stands. Would you exclude that evidence? What else can the man do to avoid a felony conviction and a ruined life? Where do you draw the line? But if you don't exclude the evidence, will some women as a result become unrapable, at least as a matter of law? That is, will women who have histories of mental instability or of "promiscuity" ever be able to convince juries who know those histories that they really were raped?

Estrich, *supra* note 1, at 518-19.

349. Discussion of prostitution herein is limited to cases involving sex for money. The related subject of sex for drugs is discussed *supra* notes 215-29 and accompanying text.

350. *Jeffries v. Nix*, 912 F.2d 982, 987 (8th Cir. 1990), *cert. denied*, 499 U.S. 927 (1991).

Commonwealth v. Vieira, 519 N.E.2d 1320, 1327-28 (Mass. 1988) (held: the trial court properly excluded evidence that complainant, two to three months before the alleged rape, offered to engage in sex with defendant and others for money, because the statement was too remote in time and substance to give rise to a reasonable inference of consent).

Winfield v. Commonwealth, 301 S.E.2d 15, 21 (Va. 1983) (ruling that evidence of mere acts of prostitution by the victim would tend only to show character and reputation, and would not be admissible).

State v. Morley, 730 P.2d 687 (Wash. Ct. App. 1986). The appellate court ruled the refusal to permit defendant's fiancée to testify that the complainant said she had been following her (complainant's) boyfriend, a musician, around the country, and had resorted to prostitution to pay her expenses to do so, was proper. *Id.* at 689. Such testimony, the court held, was at best minimally relevant, compared to the State's compelling interest in barring inflammatory and distracting evidence, preventing an acquittal based on prejudice

are excluded.³⁵¹ The Fourth Circuit has expressed the justification for this exclusion: "It is intolerable to suggest that because the victim is a prostitute, she automatically is assumed to have consented with anyone at any time."³⁵²

This, however, may not be the most appropriate approach in resolving whether to admit such evidence. A prostitute has the right to say "No," and to have the law punish someone who forces her to have sex against her will. But, particularly in a case where there is little evidence corroborating either version of what happened, is a woman with an extensive record for prostitution entitled to have the jury assume, incorrectly, that she, like most women, regards sex as a personal, private, emotional, and intimate choice, when in fact to her it is generally a commercial transaction?

Some states reject the prevailing view and admit evidence of prostitution. New York's statute admits evidence of a prostitution-related conviction if it occurred within three years of the incident being tried.³⁵³ A number of courts have stated, usually in dictum, that evidence of prior acts of prostitution generally is admissible on the issue of consent.³⁵⁴

against complainant's past sex life, and encouraging rape victims to report crimes. *Id.*

Other cases banning evidence of prostitution:

United States v. Saunders, 943 F.2d 388, 390-91 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1199 (1992).

State v. Quinn, 592 P.2d 778, 781-82 (Ariz. Ct. App. 1978).

Lewis v. State, 549 So. 2d 620, 621-22 (Ala. Ct. App. 1989).

Brewer v. United States, 559 A.2d 317, 320-22 (D.C. 1989), *cert. denied*, 493 U.S. 1092 (1990).

Roberts v. State, 510 So. 2d 885, 892 (Fla. 1987), *cert. denied*, 485 U.S. 943 (1988).

People v. Hughes, 460 N.E.2d 485, 490 (Ill. App. Ct. 1984).

People v. Williams, 330 N.W.2d 823, 829-31 (Mich. 1982).

State v. Romero, 606 P.2d 1116, 1119-20 (N.M. Ct. App. 1980).

People v. Woods, 549 N.Y.S.2d 116, 117 (N.Y. App. Div. 1989).

State v. Gardner, 391 N.E.2d 337, 340-41 (Ohio 1979).

Haynes v. State, 498 S.W.2d 950, 951-52 (Tex. Crim. App. 1973).

351. Commonwealth v. Dear, 492 A.2d 714, 716-20 (Pa. Super. Ct. 1985). Evidence of complainant's three prior convictions for criminal solicitation and prostitution was inadmissible to show she consented to having sexual intercourse with defendant. *Id.* at 718.

Johnson v. State, 598 S.W.2d 803, 805 (Tenn. Crim. App. 1979). Evidence of complainant's prior misdemeanor convictions for prostitution was inadmissible to show consent. *Id.*

352. United States v. Saunders, 943 F.2d 388, 392 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1199 (1992).

353. N.Y. CRIM. PROC. LAW § 60.42(2) (McKinney 1992).

354. State *ex rel.* Pope v. Superior Court, 545 P.2d 946, 953 (Ariz. 1976) (dictum). *But see* State v. Quinn, 592 P.2d 778, 781 (Ariz. Ct. App. 1978) (discussed *infra* note 358).

State v. Salkil, 659 S.W.2d 330, 333 (Mo. Ct. App. 1983) (dictum), *later proceeding*, 736 S.W.2d 428 (Mo. Ct. App. 1987).

Walden v. State, 542 S.W.2d 635, 636-37 (Tenn. Crim. App. 1976) (dictum). *But see*

Even jurisdictions that generally exclude evidence of unrelated acts of prostitution permit the defendant to testify that the complainant agreed to have sex with him for money on the occasion in question.³⁵⁵ Moreover, several courts indicate that where the defendant claims the complainant agreed to engage in sex with him for money and then falsely accused him of rape, evidence of prior acts of prostitution has special relevance and may be admissible.³⁵⁶ Such cases often arise in conjunction with a claim that the false accusation was motivated by the defendant's failure to pay the agreed on price.³⁵⁷ Courts also have held evidence of prior prostitution admissible where the evidence has some other specific relevance,³⁵⁸ such as to prove consent³⁵⁹ or motive to lie or

Johnson v. State, 598 S.W.2d 803, 805 (Tenn. Crim. App. 1979) (holding to the contrary).

Holloway v. State, 695 S.W.2d 112, 115-19 (Tex. Ct. App. 1985) (dictum), *aff'd*, 751 S.W.2d 866 (Tex. Crim. App. 1988).

355. See *People v. Williams*, 330 N.W.2d 823, 829-31 (Mich. 1982); *State v. Gardner*, 391 N.E.2d 337, 340-41 (Ohio 1979); *Haynes v. State*, 498 S.W.2d 950, 951-52 (Tex. Crim. App. 1973).

356. *State v. Quinn*, 592 P.2d 778, 781-82 (Ariz. Ct. App. 1978) (holding such evidence is admissible only where (1) defendant alleges the complainant actually consented to an act of prostitution, and (2) the trial judge determines that the evidence is more probative than prejudicial).

Brewer v. United States, 559 A.2d 317, 320-21 (D.C. 1989), *cert. denied*, 493 U.S. 1092 (1990) (suggesting that if the defendant testified that the complainant agreed to have sex for money on the occasion in question, evidence that the complainant engaged in prior acts of prostitution might be admissible). *But see Hagins v. United States*, 639 A.2d 612, 616-17 (D.C. 1994) (noting that the defendant's testimony that the complainant agreed to have sex with him for money did not open the door to DNA evidence suggesting that she had recently had sex with two other men, in the absence of evidence that those other episodes were for money).

See *State v. Jenkins*, 456 So. 2d 174, 179 (La. Ct. App. 1984) (holding that complainant's prior alleged history of prostitution is irrelevant where the defendant claims the complainant and he had merely renewed a pre-existing sexual relationship unconnected to prostitution, but indicating that had the defendant claimed the encounter in question was an exchange of sex for money, the evidence would have been admissible).

People v. Slovinski, 420 N.W.2d 145, 149-51 (Mich. Ct. App. 1988) (although the court did not stress this fact, it may be noteworthy that the encounter between the defendant and the complainant began on the same block where, according to two defense witnesses, the complainant regularly trolled for customers).

Contra Shaffer v. Indiana, 443 N.E.2d 838, 838-40 (Ind. 1933).

357. See *Slovinsky*, 420 N.W.2d at 146-47; see also *Hagins*, 639 A.2d at 616 (rejecting the proffer where at most defendants could only demonstrate that the complainants recently had sex with other men, but not that it had been for money); *Johnson v. State*, 632 A.2d 152, 153 (Md. 1993) (indicating that the defendants alleged that the complainant performed sexual acts in exchange for a promise of crack cocaine, then accused them of rape when they reneged).

358. *Quinn*, 592 P.2d at 781 (dictum).

359. *People v. Varona*, 192 Cal. Rptr. 44 (Cal. Ct. App. 1983). The California appellate court held that evidence that the complainant was on probation following a prostitution guilty plea should have been admitted after she testified that the defendants had attacked

her, took her to a house and forced her to perform vaginal and oral copulation shortly after a "friend" had driven her to within two blocks of a bus stop at 11:30 p.m. *Id.* at 45. Official records offered by the defendant as to the complainant's prior conviction and probation status showed that she had walked the streets in the area of the alleged attack to solicit customers, and that she not only engaged in normal intercourse, but also specialized in oral copulation. *Id.* at 46.

Demers v. State, 547 A.2d 28 (Conn. 1988). The trial court properly granted defendants' motion for a new trial, where the State withheld evidence of the complainant's prior arrest for prostitution after soliciting a plain-clothed police officer. *Id.* at 33-34. The defendants' version of the incident in question closely paralleled that of the prior incident in terms of time of day, location, the manner in which the solicitation was made, the sex acts involved and the price. *Id.* at 36. Moreover, defendants apparently gave this version of events to the police before they learned of the complainant's prior arrest, let alone the details of it, which suggests that they did not merely make up a story to match the earlier case. *Id.* Reversal may also have been justified by the fact that the complainant testified several times that she was not a "hooker" and had never engaged in sex for money, although it is unclear whether she said this on direct, thereby arguably opening the door to rebuttal. See discussion *infra* part VIII.A.

Commonwealth v. Joyce, 415 N.E.2d 181 (Mass. 1981). Held: defendant had the right to prove that the complainant had been charged with prostitution twice previously after being found naked in a car with men, to support his defense that her accusation of rape after being found by police in a similar situation with defendant was motivated by desire to avoid further prosecution. *Id.* at 187.

People v. McNab, 544 N.Y.S.2d 930 (N.Y. 1989), *later proceeding*, 562 N.Y.S.2d 590 (N.Y. App. Div. 1990). Defendant claimed the complainant willingly participated in sex in exchange for cocaine and only complained when the defendant's supply of cocaine was exhausted. *Id.* at 931. Held: the trial court properly refused to permit a witness to testify that the complainant frequented a house of prostitution and had engaged in sex for cocaine, although this testimony was directly corroborative of the defense, but only because the witness had been unable to identify the complainant from an array of twelve photos. The trial court instead properly permitted the defense to cross examine the complainant as to this allegation. *Id.* at 933-34.

State v. Williams, 487 N.E.2d 560 (Ohio 1986). Complainant testified on direct examination that she was a lesbian and therefore did not have sexual intercourse with men. *Id.* at 562-63. The Ohio Supreme Court held that under the circumstances, application of the rape shield statute to prevent introduction of evidence that the complainant is a prostitute was unconstitutional. *Id.* at 563.

Winfield v. Commonwealth, 301 S.E.2d 15 (Va. 1983). Evidence of complainant's past sexual conduct, involving a pattern of extortion of money by threat after acts of prostitution, would be admissible where defendant claimed similar conduct in the present case. However, evidence of mere acts of prostitution, tending only to show character and reputation, would not be admissible. *Id.* at 20-21.

State v. Herndon, 426 N.W.2d 347 (Wis. Ct. App. 1988). The defendant had the right to inquire into complainant's prior arrests for prostitution in the area of the alleged rape as evidence of consent and of complainant's willingness and motive to fabricate a charge of rape. *Id.* at 358-60.

See also *State v. Blue*, 592 P.2d 897 (Kan. 1979), upholding the trial court's refusal to admit evidence of an oral statement made by the complainant to a police officer when the defendant was arrested, in which she admitted acts of prostitution with other men in numerous cities throughout the United States. *Id.* at 900. The trial court did, however, admit evidence that the complainant had engaged in sexual relations for money with the defendant and a codefendant approximately one month prior to the alleged rape; the state

fabricate.³⁶⁰

2. Means of Proof

Assuming evidence of prior acts of prostitution is admissible, a court must examine the quality of evidence offered by the defendant. Although prior prostitution convictions would seem to be reliable proof, evidence of such convictions may be inadmissible hearsay³⁶¹ and may, where prostitution is a misdemeanor, fall outside the scope of convictions that may be used generally to impeach the credibility of a witness.³⁶² Additional difficulties may arise where the custom is to permit a person arrested for prostitution to plead guilty to a more generic, non-specific offense such as loitering.

Testimony by a witness that she acted as a "go-between" for the complainant and potential customers would suffice as reliable proof of prostitution.³⁶³ A witness's testimony that the complainant solicited him, or solicited others within his hearing, would also suffice.³⁶⁴ A more difficult question is whether circumstantial evidence that the complainant is a prostitute—such as testimony that the complainant frequently was observed walking the streets in revealing or provocative clothing and approaching men in a neighborhood noted for prostitution—should suffice.

Courts should exclude evidence of the complainant's *reputation* for prostitution on the same basis for excluding evidence of a reputation for promiscuity: dubious reliability, questionable relevancy, and (in some circumstances) the ease of fabrication.

VIII. OTHER SITUATIONS AND CONSIDERATIONS

Preceding sections of this article have discussed the admissibility of evidence of a complainant's prior sexual behavior which falls into fairly

supreme court expressed no opinion on the propriety of admitting this evidence. *Id.*

360. See *Joyce*, 415 N.E.2d at 187 and *Herndon*, 426 N.W.2d at 358-60, both discussed *supra* note 359.

361. See, e.g., FED. R. EVID. 803(22). This rule permits felony, but not misdemeanor, convictions to be introduced "to prove any fact essential to sustain the judgment." *Id.* Nor would a complainant's guilty plea to a prior act of prostitution be admissible as an admission by a party opponent, because the state, not the complainant, is the defendant's party-opponent. FED. R. EVID. 801(d)(2)(A). Nor, is it admissible as a declaration against interest, because the complainant is not unavailable as a witness. FED. R. EVID. 804(b)(3).

362. See, e.g., FED. R. EVID. 609 (permitting the use of a prior conviction to impeach a witness' character for credibility only if the conviction is for a felony or for a crime involving dishonesty or false statements).

363. See *People v. Slovinski*, 420 N.W.2d 145, 147 (Mich. Ct. App. 1988).

364. Police officers who charged the complainant with prostitution on prior occasions could be subpoenaed to testify as a witness for the defense.

broad categories. This section examines the admissibility of such evidence when offered under a variety of other theories of relevance. Rape shield statutes recognize some of these situations; others have emerged in the case law. The challenge is to permit defendants to offer such evidence in appropriate cases, without permitting the exceptions to swallow the rule and return the law to *status quo ante*.

A. *Evidence Elicited by Prosecutor or Volunteered by Complainant;
"Opened Door" Doctrine*

1. *In General*

FRE 412 and most state rape shield statutes provide that evidence concerning the complainant's prior sexual conduct "is not admissible" (with specified exceptions) regardless of who offers it.³⁶⁵ Accordingly, courts generally hold that the prosecutor should not offer evidence that the complainant was a virgin prior to the alleged rape.³⁶⁶ The same rule presumably would apply to evidence of the complainant's fidelity to her husband or boyfriend, although one court has admitted such evidence relating to a murder victim.³⁶⁷ Similarly, courts hold that the state should not elicit

365. FED. R. EVID. 412. *But see* MO. REV. STAT. § 491.015. 1.(4) (Supp. 1994) which exempts, "[e]vidence relating to the previous chastity of the complaining witness in cases, where, by statute, previously chaste character is required to be proved by the prosecution." *Id.*

366. *See* discussion *supra* part II.B (relating to loss of virginity as "injury"); *see also* Johnson v. State, 246 S.E.2d 363, 365-66 (Ga. Ct. App. 1978). The Georgia appellate court held that the rape shield statute supersedes all evidentiary exceptions, including the *res gestae* rule. *Id.* Hence, it was improper for the complainant to testify that during the rape she told the defendant she was a virgin. *Id.* The court further held that the defendant's failure to object waived the error and that the trial judge had correctly ruled that this did not open the door to testimony by two defense witnesses that they had engaged in sex with the complainant prior to the alleged rape. *Id.*

At least two states depart from this consensus. *See* Brewer v. State, 599 S.W.2d 141, 143-44 (Ark. 1980) (noting that ARK. CODE ANN. § 16-42-101(b) by its terms restricts only the defendant, but not the prosecutor, from offering such evidence; hence, a prosecutor may elicit testimony that the complainant had been a virgin prior to the alleged rape); State v. Stanton, 353 S.E.2d 385, 389-90 (N.C. 1987) (indicating that a rape victim may testify that she became pregnant after the rape and had no other sexual involvement around the time of the rape).

367. State v. Sexton, 444 S.E.2d 879 (N.C.), *cert. denied*, 115 S. Ct. 525 (1994). The defendant, charged with rape and murder, testified that the deceased approached him in a parking lot, offered him a ride, said she felt like cheating on her husband, initiated physical contact, performed oral sex without being asked, and then had vaginal intercourse with him. *Id.* at 890. The trial court permitted the State to elicit testimony from family and friends that the deceased was not flirtatious, had a good reputation as a family person and had never discussed going out with other men or cheating on her husband. The trial court permitted her husband to testify that to his knowledge she had never cheated on him and had an aversion to oral sex. *Id.* at 891. The Supreme Court held there was no error in allowing this testimony. *Id.* at 913.

evidence of the complainant's comparative inexperience with particular sexual practices.³⁶⁸

A few statutes explicitly permit a defendant to answer in kind if the prosecutor or complainant improperly inserts information about virginity, inexperience or fidelity into the case.³⁶⁹ Even in the absence of specific statutory authority, some courts acknowledge that the defendant may have a constitutional right to rebuttal.³⁷⁰

If the state improperly opens the door, rebuttal evidence should be admitted only if it is truly relevant, rather than collateral.³⁷¹ Further, a de-

[T]he . . . victim . . . was dead and could neither rebut the defense of consent nor risk subjecting herself to possible cross-examination about her previous sexual behavior. Therefore, the policies designed to protect rape victims personally . . . are of less importance. In addition, . . . the State did not attempt in its case in chief to introduce evidence of [the victim's] previous sexual behavior. Therefore, permitting this rebuttal evidence does not conflict with the underlying statutory policy

Id. at 900. The court further held that evidence of the complainant's reputation was admissible, per North Carolina's evidentiary rule, to rebut the defendant's testimony that the victim said she wanted to cheat on her husband, which, the court held, constituted an attack on her character for marital fidelity. *Id.* at 901 (citing N.C. R. EVID. 404(a)(2)).

368. *People v. Sandoval*, 552 N.E.2d 726, 728-31 (Ill.), *cert. denied*, 498 U.S. 938 (1990) (excluding evidence of complainant's inexperience with anal sex) (discussed *infra* note 371); *State v. Hudlow*, 659 P.2d 514, 520 (Wash. 1983) (excluding evidence of complainant's inexperience with oral sex) (discussed *infra* notes 378-85 and accompanying text). *Contra Sexton*, 444 S.E.2d at 900 (discussed *supra* note 367).

369. CAL. EVID. CODE § 1103(c)(3) (West Supp. 1995); MD. ANN. CODE art. 27, § 461A(a)(4) (1992) (provided that the judge determines the "inflammatory or prejudicial nature does not outweigh its probative value"); N.Y. CRIM. PROC. LAW § 60.42(3) (McKinney 1992); VA. CODE ANN. § 18.2-67.7A(3) (Michie 1988); WASH. REV. CODE ANN. § 9A.44.020(4) (West Supp. 1995) (providing that the court may first require a hearing before deciding what evidence should be admitted).

370. *Virgin Islands v. Jacobs*, 634 F. Supp. 933, 937 (D.V.I. 1986); *People v. Sales*, 502 N.E.2d 1221, 1224-25 (Ill. App. Ct. 1986) (involving evidence of the complainant's prior virginity); *Commonwealth v. McKay*, 294 N.E.2d 213, 217 (Mass. 1973) (same); *State v. Carpenter*, 459 N.W.2d 121, 127 (Minn. 1990) (same, but holding that the defendant's failure to comply with the statutory pretrial notice requirement justified exclusion); *State v. Kroshus*, 447 N.W.2d 203, 204-05 (Minn. Ct. App. 1989) (prosecutor elicited testimony that the complainant, a mentally retarded adult, was not educated about sexual matters; this opened the door to testimony of a prior molestation of the complainant to rebut the inference that the complainant's ability to testify about sexual matters circumstantially corroborated the allegations against defendant).

But see Johnson v. State, 246 S.E.2d 363, 365 (Ga. Ct. App. 1978) (discussed *supra* note 366 and accompanying text); *Wheeler v. State*, 596 A.2d 78, 86 (Md. Ct. Spec. App. 1991) (complainant's testimony on direct examination that she had a sexual relationship with only one person did not allow the defendant to cross-examine her about her past sexual conduct).

371. *People v. Sandoval*, 552 N.E.2d 726, 733 (Ill.), *cert. denied*, 498 U.S. 938 (1990). The complainant accused the defendant, her former boyfriend, of anal rape. On direct, she testified that she had anal sex with him twice before, but never with anyone else. *Id.* at 728. Held: although the prosecutor should not have elicited this testimony, the trial judge

fendant is precluded from opening the door by cross-examining the complainant or other witness on the subject and then seeking to rebut the testimony that he himself elicited.³⁷²

2. What Constitutes "Opening the Door"

Except perhaps where the complainant claims to have been a virgin prior to the rape,³⁷³ courts tend to be reluctant to hold that the government or complainant opened the door to such rebuttal.³⁷⁴ Cases from

did not err in refusing to permit the defendant to call another man to testify that the complainant willingly engaged in anal sex with him. *Id.* at 735-36. The court noted that at the close of the case, the trial judge instructed the jury to disregard the complainant's testimony that she had never had anal sex with anyone else. *Id.* at 729. Moreover, exclusion of the evidence did not leave the jury with a misleading portrait of the complainant; the fact that she was sexually experienced "would have been evident to the jury, for it was clear from the testimony that she was a 20-year-old mother of a two-year-old child" and had lived with the defendant for several months in a sexual relationship before moving out of his apartment, some time before the alleged rape. *Id.* at 734.

The court also rejected as collateral the defendant's attempt to impeach the complainant's testimony that since the alleged rape she had been unable to date other men. *Id.* at 742.

372. *Lewis v. State*, 440 N.E.2d 1125, 1128-29 (Ind. 1982), *cert. denied*, 461 U.S. 915 (1983), *overruled in part by* *Modesitt v. State*, 578 N.E.2d 649 (Ind. 1991) (finding that the defendant had not been denied due process of law when the court forbade him from introducing the complainant's husband's deposition to refute the husband's trial testimony, elicited on cross-examination, as to his wife's fidelity); *Sandoval*, 552 N.E.2d at 729 (complainant's testimony on cross-examination that she had been unable to date other men since the defendant raped her did not entitle the defendant to call a witness to testify that he had seen the complainant a few days before the trial "hanging all over a gentleman friend of hers" in a local bar); *Hudlow*, 659 P.2d at 526 (*see infra* note 384).

373. *See supra* notes 91-97 and accompanying text.

374. *Brewer v. United States*, 559 A.2d 317, 321-22 (D.C. 1989), *cert. denied*, 493 U.S. 1092 (1990) (holding that the prosecution did not open the door to evidence of complainant's alleged prior acts of prostitution with persons other than the defendant by asking a witness, who had been sexually intimate with complainant, whether she had ever charged the witness for sex and whether the defendant had ever told the witness that she had charged the defendant for sex).

State v. McQuillen, 689 P.2d 822, 829-30 (Kan. 1984). The court held that when a state's expert has testified that the complainant is suffering from rape trauma syndrome, defense counsel may cross-examine the expert to determine how the expert reached that conclusion, and may call an expert witness in rebuttal to testify that the complainant is not suffering from rape trauma syndrome. *Id.* at 830. Such rebuttal evidence, however, would not allow wholesale admittance of complainant's past sexual conduct, unless that information was used by the state's expert to make his or her determination of rape trauma syndrome. *Id.*

Johnson v. State, 632 A.2d 152 (Md. 1993) (holding that complainant's direct testimony that she approached defendants to purchase crack-cocaine, was told to get down on her hands and knees, and that she told them she was not there to exchange sex for drugs because she had money to pay for them, did not open the door to evidence that she had exchanged sex for drugs on other occasions).

Joyce v. State, 474 A.2d 1369, 1373 (Md. Ct. Spec. App. 1984) (concluding that a prose-

Hawaii and Washington illustrate the difficulties in drawing the line. In *State v. Calbero*,³⁷⁵ the complainant, asked on direct why she had not told the defendant to stop fondling or undressing her, testified, "I got scared . . . I [had] never been in that situation before."³⁷⁶ Hawaii's Supreme Court held that this testimony created the inference that the complainant had not had any sexual experience and hence, it was constitutional error to exclude comments allegedly made by the complainant, just before the defendant began fondling her, that "my boyfriends do a lot for me . . . I can get any man I want . . . if I'm in the mood, and I just so happen to be in the mood."³⁷⁷

In *State v. Hudlow*,³⁷⁸ two men were convicted of assaulting and raping two women. One complainant testified on direct examination that one of the defendants ordered her to give him a "blow job"; that she told him she did not know what it was; that when she said this, she did in fact know it meant to perform oral sex; that he told her she would have to do it anyway; and that he forced her to do so, after which she vomited.³⁷⁹ Defense counsel then sought to offer evidence that the complainant: was indiscriminately promiscuous, was concerned that men did not consider her sufficiently skilled at oral sex, and had previously sought advice and instruction from a friend (the other rape complainant) on how to improve her technique.³⁸⁰

Interpreting a statute which explicitly permitted rebuttal evidence where the state had opened the door,³⁸¹ Washington's Supreme Court

cutor's offer of proof during oral argument at the bench does not trigger a defendant's right to elicit contradictory evidence before the jury).

White v. State, 498 So. 2d 368, 372 (Miss. 1986). The State introduced evidence of African-American pubic hairs found in the complainant's bed and on a towel outside her apartment, then asked her whether any African-American persons had been in her bedroom at any other time. The court held this did not open a line of questioning as to complainant's sexual conduct. *Id.*

State v. Camara, 781 P.2d 483, 490 (Wash. 1989). A male rape complainant's testimony that he had not wanted to engage in anal intercourse with the defendant because such intercourse was unsafe and he did not find it pleasurable did not entitle the defendant to cross-examine complainant about his sexual history. *Id.*

375. 785 P.2d 157 (Haw. 1989).

376. *Id.* at 158.

377. *Id.* at 159.

378. 659 P.2d 514 (Wash. 1983) (discussed *supra* notes 336-48 and accompanying text).

379. *Id.* at 524-26. On cross-examination, when defense counsel sought to explore the supposed discrepancy between telling the defendant she did not know what the term meant and her acknowledgment on direct that she did know, the complainant testified that she knew its meaning because of discussions with other girls at school. *Id.* at 525.

380. *Id.* at 516-17.

381. WASH. REV. CODE ANN. § 9A.44.020(4) (West 1995). This statute provides:

Nothing in this section shall be construed to prohibit cross-examination of the victim on the issue of past sexual behavior when the prosecution presents evi-

held that the State had not done so: "Obviously, [complainant] told Hudlow that she did not know how to perform oral sex as an evasive maneuver to escape having to perform the act. We do not think such testimony was intended or interpreted to convey ideas of [complainant's] sexual virtuousness."³⁸² Similarly, "[her] simple statement that she vomited after being forced to perform oral sex at knifepoint had nothing to do with her past experience or familiarity with performing oral sex with other men."³⁸³ Had she testified that she vomited because it was the first time she had performed oral sex, by contrast, "[s]uch testimony would open up her past experience to cross-examination."³⁸⁴ One judge dissented, arguing that however the complainant and prosecutor meant her testimony, the jury could have understood it to mean, "I knew what he meant, but not how to do it," and that this sufficed to open the door.³⁸⁵

Indeed, a jury might interpret the complainant's testimony as the dissent suggested, but it was within the trial court's discretion to assess whether the jury was likely to interpret her testimony in that manner. The defendant has other means available to protect against that interpretation other than admitting evidence of the complainant's prior sexual behavior. The judge, for example, could instruct the prosecutor not to refer in summation to the complainant's claim of inexperience or to the fact that she vomited afterward. Similarly, the judge could instruct the jury that the complainant's prior sexual experience or lack thereof is irrelevant and therefore neither party would be permitted to elicit testimony about it.

3. *Evidence that Complainant Is or Is Not Homosexual*

It is improper for the state, in an effort to bolster the complainant's testimony that she did not consent, to elicit testimony that she is a lesbian.³⁸⁶ One court has held that the defendant must be given an oppor-

dence in its case in chief tending to prove the nature of the victim's past sexual behavior, but the court may require a hearing pursuant to subsection (3) of this section concerning such evidence.

Id.

382. *Hudlow*, 659 P.2d at 525.

383. *Id.* at 526.

384. *Id.* The court added that the complainant's testimony on cross-examination, explaining she knew what the term meant from discussions with girls at school, did not open the door to rebuttal, because such evidence was elicited by the defense, not the prosecution. *Id.* at 525.

385. *Id.* at 527 (Utter, J., dissenting).

386. *People v. Kemblowski*, 559 N.E.2d 247, 249-51 (Ill. App. Ct. 1990) (holding it was reversible error to allow the prosecutor to admit such evidence, including the complainant's testimony that she had not consummated her marriage).

tunity to rebut such evidence;³⁸⁷ another has held that such testimony did not open the door to evidence that the complainant previously had sexual activity with men.³⁸⁸ Two courts, in cases involving homosexual rape, have held that the defendant is not entitled to introduce evidence of the complainant's prior homosexual conduct.³⁸⁹

B. Miscellany

1. Child Abuse Cases: Admissibility on Source of Knowledge

A prosecution for sexual activity with a child may differ in many ways from a prosecution involving an adult complainant. Depending upon the child's age, sophistication, and a variety of other factors, the child complainant³⁹⁰ may be particularly vulnerable to suggestion. In addition, the child complainant may lack the ability to communicate clearly what happened, may be further traumatized by testifying in open court, or may be unable to testify at all. In addition, although a jury's reaction to an adult sex offense complainant may be skeptical or harshly judgmental, a jury's instinctive reaction to a child complainant will almost always be sympathetic.

A majority of states apply their rape shield laws to cases involving child complainants.³⁹¹ Some of the exceptions recognized by such statutes ob-

387. *State v. Williams*, 487 N.E.2d 560, 562-63 (Ohio 1986). The court held that the defendant's Sixth Amendment rights were violated by the exclusion of evidence that the complainant was a prostitute, of testimony by another man that he had engaged in sex with the complainant, and the defendant's testimony that he had prior consensual sex with the complainant. The defendant claimed the complainant had consented while the complainant contended she was a lesbian and thus would not have consented to sex with a male. *Id.* at 562-64.

388. *Meaders v. United States*, 519 A.2d 1248, 1252-53 (D.C. 1986).

389. *People v. Hackett*, 365 N.W.2d 120, 126-27 (Mich. 1984). "[T]he fact that a person is a homosexual, standing alone, has little or no logical relevance between the excluded prior sexual acts evidence and the issues of consent or credibility." *Id.* Thus it was proper to reject evidence offered by an African-American prison inmate accused of raping a white inmate that the complainant had consented to acts of sodomy with other African-American inmates. *Id.*

State v. Camara, 781 P.2d 483, 490 (Wash. 1989). A male rape complainant's testimony that he had not wanted to engage in anal intercourse with defendant because such intercourse was unsafe and complainant did not find it pleasurable did not entitle defendant to cross-examine complainant about his sexual history. *Id.*

390. The term "victim" might be more appropriate in this context, because a child of tender years who is subjected to sexual contact is by definition a victim. The term "complainant" is nevertheless used because in a case without objective physical evidence that sexual contact has occurred, to refer to the child as a "victim" presupposes that someone has molested the child, an issue which may be contested at trial.

391. See Tanya Bagne Marcketti, Note, *Rape Shield Laws: Do they Shield Children?* 78 IOWA L. REV. 751, 756 (1993) (arguing that the policies underlying the rape shield statutes apply equally to minors); Kim Steinmetz, Note, *State v. Oliver: Children with a Past; The*

viously will apply in certain cases, such as the provision permitting a defendant to offer evidence that someone else was the source of semen or injury.³⁹² Other exceptions, conversely, will not apply. For example, consent is generally not a defense to a prosecution for child molestation or statutory rape.³⁹³ Thus, evidence of prior consensual conduct between the complainant and the defendant would not constitute a defense to most child sex allegations.³⁹⁴

Nevertheless to support the admission of a child complainant's prior sexual experience, attorneys defending child sex offense charges have developed a theory, which one student scholar has aptly named the "sexual innocence inference" theory.³⁹⁵ The theory is based on the premise that because most children of tender years are ignorant of matters relating to sexual conduct, a child complainant's ability to describe such conduct may persuade the jury that the charged conduct in fact occurred. To demonstrate that the child had acquired sufficient knowledge to fabricate a charge against the defendant, the theory reasons, the court should allow the defense to offer evidence that the child acquired sexual experience with someone else before he or she accused the defendant.

Most courts that have considered the issue agree that a jury might make such an inference, and that evidence that the child had previous sexual experiences may be relevant to rebut the charge.³⁹⁶ One court

Admissibility of the Victim's Prior Sexual Experience in Child Molestation Cases, 31 ARIZ. L. REV. 677, 685 (1989) (discussing the judiciary's application of the rape shield statutes to minors). See generally *supra* notes 94-97 and accompanying text.

But see *State v. Carver*, 678 P.2d 842 (Wash. Ct. App. 1984). "The evidence proffered in this case does not fit within the concepts and purposes of the rape shield statute. [T]he evidence sought to be admitted here was prior sexual abuse, not misconduct, of a victim." *Id.* at 843. This reasoning was subsequently affirmed by Washington's highest court. *State v. Markle*, 823 P.2d 1101, 1109 (Wash. 1992).

392. See *supra* parts II.A. and II.D. (physical evidence).

393. 65 AM. JUR. 2D Rape § 23 (1972).

394. See, e.g., *Simmons v. State*, 308 S.E.2d 27, 30 (Ga. Ct. App. 1983); *Thompson v. State*, 555 N.E.2d 1301, 1302-03 (Ind. Ct. App. 1990); *Commonwealth v. Domaingue*, 493 N.E.2d 841, 845 (Mass. 1986); *People v. Mann*, 569 N.Y.S.2d 270, 271 (N.Y. App. Div. 1991).

395. Christopher B. Reid, Note, *The Sexual Innocence Inference Theory as a Basis for the Admissibility of a Child Molestation Victim's Prior Sexual Conduct*, 91 MICH. L. REV. 827, 829 (1993) (arguing that evidence of a child's prior sexual activity may be admitted to establish that the child possessed the sexual knowledge to fabricate a charge against the defendant).

No one term is adequate to describe the broad variety of conduct alleged in such prosecutions, which ranges from consensual encounters between children of almost the same age to violent, vile and depraved exploitation of children by adults. I use the term "sexual experience" to include everything within this range of conduct.

396. See, e.g., *State v. Howard*, 426 A.2d 457, 462 (N.H. 1981). The court stated:

We believe that the average juror would perceive the average twelve-year-old

held this in a case involving a mentally retarded adult complainant.³⁹⁷ Other state courts reject the argument that juries are likely to draw the inference. These courts categorically exclude such evidence as having only marginal relevance at best while having enormous potential to embarrass the complaining witness, invade his or her privacy, confuse the jury, and prejudice the prosecution.³⁹⁸

A court's acknowledgement of the inference and a defendant's valid interest in rebutting it does not guarantee the admissibility of the complainant's prior sexual experience. A court must assess the legitimate probative value of the evidence against the risk of unfair prejudice and the other concerns underlying rape shield legislation. A number of factors are relevant to this assessment:

(1) The age of the child. The older the child, the less likely a jury is to assume that the child could not have picked up sexual knowledge second-

girl as a sexual innocent. Therefore, it is probable that jurors would believe that the sexual experience she describes must have occurred in connection with the incident being prosecuted; otherwise, she could not have described it. However, if statutory rape victims have had other sexual experiences, it would be possible for them to provide detailed, realistic testimony concerning an incident that may never have happened. To preclude a defendant from presenting such evidence to the jury, if it is otherwise admissible, would be obvious error. Accordingly, a defendant must be afforded the opportunity to show, by specific incidents of sexual conduct, that the prosecutrix has the experience and ability to contrive a statutory rape charge against him.

Id. The defendant sought to prove that the complainant had been seen masturbating a bull, had sex with her father and grandfather, had undressed boys for whom she had babysat, and had engaged in sex acts with others while being shown on closed-circuit television. *Id.* at 458-59.

Other case law recognizes that a jury might draw this inference:

State v. Oliver, 760 P.2d 1071, 1076-77 (Ariz. 1988).

People v. Rice, 709 P.2d 67, 68-69 (Colo. Ct. App. 1985).

State v. Jacques, 558 A.2d 706, 708 (Me. 1989).

Commonwealth v. Ruffen, 507 N.E.2d 684, 687 (Mass. 1987).

Commonwealth v. Rathburn, 532 N.E.2d 691, 695-96 (Mass. App. Ct. 1988).

State v. Benedict, 397 N.W.2d 337, 340-41 (Minn. 1986).

Woodruff v. State, 518 So. 2d 669, 671-72 (Miss. 1988).

Summitt v. State, 697 P.2d 1374, 1376-77 (Nev. 1985).

State v. Budis, 580 A.2d 283, 290 (N.J. Super. Ct. App. Div. 1990), *aff'd*, 593 A.2d 784 (N.J. 1991).

State v. Pulizzano, 456 N.W.2d 325, 334-35 (Wis. 1990).

397. State v. Kroshus, 447 N.W.2d 203, 205 (Minn. Ct. App. 1989).

398. See People v. Compos, 507 N.E.2d 1342, 1348 (Ill. App. Ct. 1987) (categorizing evidence of an eleven-year-old complainant's prior sexual conduct as "irrelevant"); see also People v. Arenda, 330 N.W.2d 814, 818 (Mich. 1982). But see People v. Mason, 578 N.E.2d 1351, 1354-55 (Ill. Ct. App. 1991) (holding that excluding evidence that a seven-year-old complainant had watched pornographic videos was reversible error); State v. Clarke, 343 N.W.2d 158, 163 (Iowa 1984); People v. Adams, 440 N.W.2d 416 (Mich. 1989) (Levin, J., dissenting); Commonwealth v. Appenzeller, 565 A.2d 170, 172 (Pa. Super. Ct. 1989).

hand.³⁹⁹

(2) The kind of sexual behavior involved.⁴⁰⁰

(3) Whether the prior sexual experience was sufficiently similar to the conduct the defendant is accused of committing to have enabled the child to fabricate the accusation.⁴⁰¹

(4) The availability of evidence suggesting that the child had acquired sexual knowledge by other means, for example, from seeing the activities of others, from movies, conversations with friends, books, sex education classes in school, and the like.⁴⁰²

399. *Compare* Commonwealth v. Costello, 635 N.E.2d 255, 258 (Mass. App. Ct. 1994) (an eighteen-year-old testifying about events alleged to have occurred four years earlier "may be assumed to have sufficient knowledge about sexual matters to discuss intercourse") and Commonwealth v. Rathburn, 532 N.E.2d 691, 695-97 (Mass. App. Ct. 1988) (a thirteen-year-old girl had not demonstrated knowledge of sexual matters beyond her years and thus the jury would be unlikely to make the sexual innocence inference) with Commonwealth v. Ruffen, 507 N.E.2d 684, 688 (Mass. 1987) (if the prior experience of the complainant, ten-years-old at the time of trial, resembled her allegations against the defendant, evidence of the prior experience would be admissible) and State v. Howard, 426 A.2d 457, 462 (N.H. 1981) ("We believe that the average juror would perceive the average twelve-year-old girl as a sexual innocent"). See Reid, *supra* note 395, at 852 n.138 (citing studies suggesting that most children begin to mature physically at about age twelve and that most American children have had some sort of sexual experience with another person before reaching the age of twelve).

400. For example, while most eleven or twelve-year-old children could probably describe vaginal intercourse without having experienced it, it is difficult to conceive of a five-year-old even imagining anal intercourse without having been subjected to it.

401. State v. Oliver, 760 P.2d 1071, 1077 (Ariz. 1988) (requiring defendant to make an *in camera* showing that the prior sexual conduct did occur, and that it was sufficiently similar to the charged conduct).

Commonwealth v. Ruffen, 507 N.E.2d 684, 687-88 (Mass. 1987) (permitting defendant charged with sexually abusing a child to *voir dire* the complainant and complainant's mother to determine whether the child had been sexually abused in the past, as such abuse would bear on the child's knowledge of sexual acts and terminology).

State v. Budis, 593 A.2d 784 (N.J. 1991). Evidence of a nine-year-old sexual assault victim's prior victimization by her stepfather, which she had described in language almost identical to the language she used to describe the alleged incident with defendant, was admissible to show her knowledge of sexual acts. *Id.* at 794.

In State v. Pulizzano, 456 N.W. 2d 325, 334-35 (Wis. 1990), the court held that the defendant must show:

- (1) that the prior acts clearly occurred; (2) that the acts closely resembled those of the present case; (3) that the prior act is clearly relevant to a material issue; (4) that the evidence is necessary to the defendant's case; and (5) that the probative value of the evidence outweighs its prejudicial effect.

Id.

402. People v. Mason, 578 N.E.2d 1351, 1353-54 (Ill. App. Ct. 1991) (reversible error to exclude evidence that the seven-year-old complainant had watched pornographic videos).

People v. Arenda, 330 N.W.2d 814, 818 (Mich. 1982).

State v. Weiler, 801 S.W.2d 417, 419 (Mo. Ct. App. 1990), *cert. denied*, 502 U.S. 905 (1991).

State v. Wright, 776 P.2d 1294, 1298 (Or. Ct. App. 1989) (evidence of the complainant's

(5) Availability of proof of the child's prior sexual experience other than the child's own testimony.⁴⁰³

(6) The existence of evidence suggesting that the complainant may have a motive to fabricate a charge against the defendant.⁴⁰⁴

(7) The conduct of the prosecutor. If the state suggests or exploits the sexual innocence inference, this might legitimately open the door.⁴⁰⁵ On the other hand, a prosecutor may be able to shut the door to evidence of the complainant's prior sexual experience by stipulating that children of the complainant's age usually possess enough sexual knowledge to fabricate the events.⁴⁰⁶

2. Complainant "Confusion"

A claim is occasionally raised that evidence of other sexual behavior is relevant to show that the complainant is "confused" as to what happened or who assaulted her. Courts have admitted such evidence where there is a substantial basis to support a claim of confusion,⁴⁰⁷ while rejecting it

past sexual history was not relevant where the complainant's knowledge is not at issue).

Commonwealth v. Appenzeller, 565 A.2d 170, 172 (Pa. Super. Ct. 1989) (noting that where the child complainant was unsupervised and on the street, "it is highly likely she learned of sexual terms and anatomy in her play as well as with the contacts with appellant").

See Reid, *supra* note 395, at 860; see also 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE* § 5387 (West Supp. 1994) (arguing that the sexual innocence inference can and should always be rebutted with this method).

403. *State v. Budis*, 593 A.2d 784, 790-91 (N.J. 1991). The risk of embarrassing or humiliating the child may be diminished if the evidence can be adduced from sources other than the child, such as from another witness, official documents involving convictions arising out of the prior abuse, or by stipulation.

404. *State v. Weeks* 782 P.2d 430, 432 (Or. Ct. App. 1989).

405. *Budis*, 593 A.2d at 793; *People v. Adams*, 440 N.W.2d 416, 416-17 (Mich. 1989) (Levin, J., dissenting); *Appenzeller*, 565 A.2d at 172; see also *State v. Ross*, 592 A.2d 291, 292 (N.J. Super. Ct. App. Div. 1991) (indicating that the prosecutor's argument during summation that the complainant's naiveté precluded fabrication constituted plain error, where the prosecutor was aware that the child's claims of prior sexual victimization provided her with a degree of knowledge potentially belying her alleged naiveté).

406. *Budis*, 593 A.2d at 791.

407. *Saylor v. State*, 599 N.E.2d 332, 335-36 (Ind. Ct. App. 1990) (error to exclude evidence that the defendant's mentally handicapped stepdaughter, who had a poor concept of time, had been molested at least two years before the defendant met her; the evidence should have been admitted to support his claim that as a result of her poor concept of time, her identification of defendant as the abuser was unreliable).

Wood v. State, 534 N.E.2d 1146, 1149-50 (Ind. Ct. App. 1989) (error to exclude evidence of other molestations of an eight-year-old girl by other perpetrators on or near the dates specified in the charges against the defendant).

Commonwealth v. Baxter, 627 N.E.2d 487, 491 (Mass. App. Ct. 1994) (error to exclude evidence of a prior rape where the teenage complainant was unable to distinguish between the prior rape and the alleged rape in the case at bar); see *supra* note 251. Concerning admissibility of a complainant's prior true rape complaints, see generally *supra* part V.A.2.

where the claim is merely speculative or conjectural.⁴⁰⁸

3. *Mistake of Fact Defense: "Reasonable Belief" that Complainant Consented*

Although sex crime definitions vary from jurisdiction to jurisdiction, most sex-related felonies require the prosecutor to prove the defendant had a culpable mental state (*mens rea*) with regard to the complainant's lack of consent. Generally, in a rape prosecution, a jury must find beyond a reasonable doubt, not only that the complainant did not consent, but that the defendant knew, or should have known, that the complainant did not consent. Thus, a reasonable belief that the complainant consented, even if mistaken, is a defense to the crime.⁴⁰⁹ In an attempted rape prosecution, the prosecutor generally must prove that the defendant knew the complainant did not consent; an honest mistake, even if unreasonable, is a defense.⁴¹⁰

In many cases, mistake of fact is not an issue. If, for example, the complainant alleges that the defendant raped her at knifepoint while the de-

State v. Ray, 637 S.W.2d 708, 710 (Mo. 1982) (error to exclude evidence that the adult complainant was so intoxicated by alcohol and drugs that she may have confused what happened on the night in question with the previous night); *see supra* notes 310-12.

See also Commonwealth v. Fitzgerald, 590 N.E.2d 1151, 1155-56 (Mass. 1992).

408. Laughlin v. State, 872 S.W.2d 848, 852 (Ark. 1994). In a prosecution of a thirty-two-year-old man for sexually abusing boys under the age of 14, the defendant sought to ask one eleven-year-old complainant whether he had ever had homosexual sex with his brother. The defendant wanted to show that it was the brother, and not defendant, who had molested the child; held, no error to preclude the cross-examination. *Id.*

State v. Kulmac, 644 A.2d 887 (Conn. 1994). Defendant claimed that the multiplicity of people who had sexually abused two preteenage girls of less than average intelligence created a risk of confusion between, and misidentification of, the various perpetrators. *Id.* at 894. The Connecticut Supreme Court held it was no abuse of discretion to exclude the evidence of other abuses. *Id.* The court reasoned:

Whether there is a sufficient basis for a claim that a witness is confused, so as to permit cross-examination that would otherwise be inadmissible, is a question of fact that is properly left to the discretion of the trial court. In this case, the trial court permitted extensive cross-examination concerning the numerous counts of sexual abuse committed by the defendant, and had ample opportunity to observe whether the victims confused or intermixed the events that were at issue at trial. Moreover, the trial court explicitly found that neither victim appeared confused, and that any abuses committed on [one of them] were too remote in time from the abuses at issue in the trial to cause confusion.

Id.

409. *See, e.g.,* People v. Mayberry, 125 Cal. Rptr. 745, 752 (Cal. 1975). Some rape shield statutes explicitly acknowledge this principle of substantive criminal law. *See, e.g.,* GA. CODE ANN. § 24-2-3(c)(2) (1994); N.C. R. EVID. 412(b)(3) (relating only to distinctive patterns of behavior); TENN. R. EVID. 412(c)(4)(iii) (same).

410. This rule derives, not from any unique characteristic of the crime of attempted rape, but from the general principles of the law of "attempts."

fendant insists that the complainant was a willing and eager partner, neither version raises the question of reasonable mistake of fact: guilt or innocence depends simply on whether the jury believes the complainant beyond a reasonable doubt. Mistake of fact is a valid issue, by contrast, when the jury is satisfied that the complainant did not consent but conflicting versions of what happened create an issue of fact as to whether the defendant used or threatened to use force, or as to how clearly the complainant communicated her unwillingness to have sex.⁴¹¹ In such a case, the jury must decide key issues about the defendant's state of mind—such as whether he actually believed that the complainant consented and, where the charge is rape, whether that belief was reasonable.

Traditionally, the complainant's reputation for chastity or promiscuity and details concerning her alleged prior sexual activity, if known to the defendant prior to the events giving rise to the accusation, were considered relevant on the question of whether the defendant believed she consented (and where relevant, whether the belief was reasonable). If a man had heard that the complainant had said yes to other men,⁴¹² this made his professed belief that her response to him also meant yes more believable and more reasonable.⁴¹³ But this reasoning, if accepted, would often require admission of evidence of the complainant's reputation and of specific instances of her past sexual conduct, thereby undoing precisely what rape shield legislation was designed to accomplish.

In *Doe v. United States*,⁴¹⁴ the Fourth Circuit, applying FRE 412, held that evidence of the complainant's reputation for promiscuity, if known to the defendant prior to their encounter, was admissible on the issue of the accused's state of mind.⁴¹⁵ The decision was much-criticized,⁴¹⁶ and the court essentially overruled that holding in *United States v. Saun-*

411. Many states still require the prosecutor to prove that the defendant used or threatened force, or that the complainant resisted. See, e.g., *Commonwealth v. Berkowitz*, 641 A.2d 1161, 1164-65 (Pa. 1994). Some statutes have eliminated these requirements, requiring the prosecutor to prove only lack of consent. DEL. CODE ANN. tit. 11, § 773 (1974 and Supp. 1994); WIS. STAT. ANN. § 940.225(3) (West 1982).

412. Information learned after the event is not relevant as to the existence or reasonableness of his belief at the time. *Doe v. United States*, 666 F.2d 43, 48 (4th Cir. 1981); *Jeffries v. Nix*, 912 F.2d 982, 987 (8th Cir. 1990), *cert. denied*, 499 U.S. 927 (1991); *Lamar v. State*, 254 S.E.2d 353, 355 (Ga.), *appeal dismissed*, 444 U.S. 803 (1979); *Moore v. State*, 395 S.E.2d 13, 15 (Ga. Ct. App. 1990); *Burley v. State*, 378 S.E.2d 328, 331 (Ga. Ct. App. 1989); *Rohm v. State*, 558 N.E.2d 1100, 1103 (Ind. 1990); *State v. Rhinehart*, 316 S.E.2d 118, 120-21 (N.C. Ct. App. 1984).

413. See, e.g., *Berger*, *supra* note 6, at 15; *Tanford & Bocchino*, *supra* note 8, at 591-602.

414. 666 F.2d 43, 47-48 (4th Cir. 1981).

415. *Id.*

416. See, e.g., Robert G. Spector & Teree E. Foster, *Rule 412 and the Doe Case: The Fourth Circuit Turns Back the Clock*, 35 OKLA. L. REV. 87, 96-97 (1982).

ders.⁴¹⁷ Although consent was not technically an issue in *Saunders*, because the defendant denied that he had sex with the complainant at the time and place she alleged, the court observed: "When consent is the issue, . . . [FRE 412](b)(1)(B) permits only evidence of the defendant's past experience with the victim. The rule manifests the policy that it is unreasonable for a defendant to base his belief of consent on the victim's past sexual experiences with third persons"⁴¹⁸ Similarly, a California appellate court has held that evidence of the complainant's past sexual conduct with persons other than the defendant is inadmissible as evidence of the defendant's reasonable belief that she consented.⁴¹⁹ When a Georgia intermediate appellate court held to the contrary,⁴²⁰ the legislature amended the state's rape shield law to preclude this result.⁴²¹ These commendable developments are consistent with the policies underlying rape shield legislation.⁴²²

IX. JUDICIAL ASSESSMENT OF WITNESS CREDIBILITY

As previously discussed, evidence relating to a complainant's prior sexual behavior may have sufficient relevance on a variety of theories to overcome a rape shield objection; but to have such special relevance the evidence must be fact, not fabrication. It is not uncommon for a defendant to offer evidence about the complainant's past which the complainant insists is a lie. In deciding on the admissibility of such evidence, must the judge assume the defendant's evidence is true; or may a judge base the ruling, in whole or in part, on an assessment of who is telling the truth?

A. Conditional Relevancy or Technical Admissibility

The answer, not surprisingly, depends upon the question being asked.

417. 943 F.2d 388 (4th Cir. 1991), *cert. denied*, 502 U.S. 1105 (1992).

418. *Id.* at 392.

419. *People v. Guthreau*, 162 Cal. Rptr. 376, 380 (Cal. Dist. Ct. App. 1980).

420. *Hamilton v. State*, 365 S.E.2d 120, 123 (Ga. Ct. App. 1987) (holding it was error to deny a hearing on the defendant's offer of proof relating to the witness's past sexual behavior where defendant offered to prove that the complaining witness had prior sexual encounters with the defendant and others, and the defendant knew of her reputation at the time of the incident). Similarly, see *Hardy v. State*, 285 S.E.2d 547, 550-51 (Ga. Ct. App. 1981) (admitting evidence of the complainant's sexual history in a case of an alleged gang rape by members of a college fraternity).

421. The Georgia Code, which excepted evidence relevant to defendant's reasonable belief from the general rule of exclusion, was amended in 1989 and now admits evidence of the complainant's prior sexual conduct only if that conduct was with the defendant. GA. CODE ANN. § 24-2-3(b) (1982 & Supp. 1994).

422. See, e.g., Sakthi Murthy, *Rejecting Unreasonable Sexual Expectations: Limits on Using a Rape Victim's Sexual History to Show the Defendant's Mistaken Belief in Consent*, 79 CAL. L. REV. 541, 551-54 (1991):

In deciding on admissibility, is the judge's task that of deciding whether the evidence is relevant, or is the judge to determine whether the technical requirements for admissibility have been satisfied?

1. *Conditional Relevancy*

Where the issue is whether a condition of *relevancy* has been met, a judge's fact-finding and credibility-assessing role is limited. In this setting, the judge decides whether the offering party has presented sufficient evidence for a jury to find the necessary connection. This principle is codified in FRE 104(b):

Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.⁴²³

If the offering party has met this burden, the judge must admit the evidence and allow the jury to decide whether to believe it and how much weight, if any, to give it.⁴²⁴

423. FED. R. EVID. 104(b). The Advisory Committee's Note to the rule offers an example of such conditional relevancy: "when a spoken statement is relied upon to prove notice to X, it is without probative value unless X heard it." FED. R. EVID. 104(b) Advisory Committee's Note. The Note comments:

If preliminary questions of conditional relevancy were determined solely by the judge . . . the functioning of the jury as a trier of fact would be greatly restricted and in some cases virtually destroyed . . . The judge makes a preliminary determination whether the foundation evidence is sufficient to support a finding of fulfillment of the condition. If so, the item is admitted. If after all the evidence on the issue is in, pro and con, the jury could reasonably conclude that fulfillment of the condition is not [sic] established, the issue is for them. If the evidence is not such as to allow a finding, the judge withdraws the matter from their consideration.

Id.

States whose evidence codes are modeled on the FRE as a rule incorporate FRE 104(b) without significant variation. 1 GREGORY P. JOSEPH & STEPHEN A. SALTZBURG, EVIDENCE IN AMERICA 3 (1994).

424. See, e.g., *Huddleston v. United States*, 485 U.S. 681, 690 (1988). Huddleston was charged with selling stolen video cassettes; he defended by asserting that he did not know they were stolen. *Id.* at 682-83. As circumstantial evidence of knowledge, the Government, relying on the principle that evidence of other similar acts is admissible to prove a defendant's mental state with regard to the charged conduct, offered evidence of his involvement in two similar transactions, one involving stolen appliances, the other involving several black and white television sets. *Id.* at 683. The Government offered direct proof that the appliances were indeed stolen, but lacked comparable evidence as to the televisions, which defendant had offered to various merchants at \$28 each. *Id.*

The defendant conceded admissibility of the evidence relating to the appliances. *Id.* at 686. Defendant argued, however, that the evidence about the televisions was not relevant as a basis to infer that he knew the video cassettes were stolen unless the Government proved by a preponderance of the evidence that the televisions were stolen. *Id.* at 686-87.

An offering party can meet this easy burden by either direct or circumstantial evidence. Direct evidence—testimony by a witness who claims first-hand knowledge of the facts in question—always suffices, because witness credibility is for the jury, not the judge, to determine.⁴²⁵ A witness's testimony that he participated in or observed prior sexual behavior by the complainant therefore satisfies this burden, however vehemently and persuasively the complainant denies the allegation.

2. *Technical Issues and Policy Concerns*

When constitutional or technical conditions must be satisfied to secure admissibility of evidence, by contrast, the offering party generally must persuade the judge as to the existence of those conditions by a preponderance of the evidence. Frequently this requires a judge to assess the credibility of witnesses. For example, the Supreme Court has held that in order to secure admissibility of statements elicited during custodial interrogation, a prosecutor must persuade the judge, by a preponderance of the evidence, that law enforcement officials gave the defendant the "Miranda warnings,"⁴²⁶ that the defendant knowingly and intelligently waived the rights to silence and an attorney,⁴²⁷ and that the defendant

The Supreme Court agreed that the television evidence was relevant only if the sets were stolen, but rejected defendant's contention that before allowing the jury to consider the evidence the judge had to be satisfied of this fact by a preponderance of the evidence. *Id.* at 690-91. The Court stressed that neither FRE 104(a) nor FRE 104(b) contained language supporting this position. *Id.* at 689-90. Rather, FRE 104(b) directs that a party satisfies the condition for relevancy by offering evidence "sufficient to support a finding" that the evidence is relevant. *Id.* at 691. In making this assessment, the Court held a trial judge neither weighs the credibility of the evidence nor makes a finding that the government has proved the conditional fact by a preponderance of the evidence, but "simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact—here, that the televisions were stolen—by a preponderance of the evidence." *Id.* at 690. The Court concluded that the evidence supporting the inference that television sets in *Huddleston* were stolen was circumstantial, yet sufficient. *Id.* at 691.

The Court acknowledged that issues other than relevance (such as the risk of unfair prejudice) raised by the evidence were exclusively within the judge's province to resolve. *Id.* at 690.

425. A witness' direct testimony to a fact presents sufficient evidence to permit a rational fact finder to accept that fact as true. See generally 1 C. FISHMAN, JONES ON EVIDENCE § 3:33 (7th ed. 1994). An exception to this rule exists if the "facts" to which the witness testifies are patently impossible. A witness might testify, for example, that he was at Wrigley Field last fall to see the Chicago Cubs win the 1994 World Series, but a jury could not rely on such testimony to conclude that the Cubs won the Series because, due to the strike by major league players that began in August, no World Series was played last year. (Baseball fans know that this is the *other* reason why no rational jury could conclude that the Cubs won the World Series—any World Series. Non-baseball fans should ignore this parenthetical lest they become confused.)

426. *Miranda v. Arizona*, 384 U.S. 436 (1966).

427. *Colorado v. Connelly*, 479 U.S. 157, 167-69 (1986) (applying the preponderance

made the statement voluntarily.⁴²⁸ For each of these findings the judge must decide whether to credit the testimony of the interrogating officers. Similarly, in applying the Fourth Amendment, the government must establish by a preponderance of the evidence that the agents' actions were justified or satisfied some exception to the exclusionary rule.⁴²⁹ This inevitably requires a judge to assess the truthfulness of the agents.

The preponderance standard is not reserved solely for constitutional issues. As the Supreme Court has explained, "[t]he preponderance standard ensures that before admitting evidence, the court will have found it more likely than not that the technical issues and policy concerns addressed by the Federal Rules of Evidence have been afforded due consideration."⁴³⁰ The Supreme Court has held, for example, that to secure admission of a statement pursuant to the co-conspirator exception to the hearsay rule, a party must satisfy the requirements of that exception by a preponderance of the evidence.⁴³¹

B. Rape Shield Legislation

Most rape shield statutes are silent on the issue of judicial assessment

standard to the question of waiver).

428. *Lego v. Twomey*, 404 U.S. 477, 488-89 (1972) (applying the preponderance standard to the question of voluntariness).

429. See, e.g., *Nix v. Williams*, 467 U.S. 431, 444 n.5 (1984) (to satisfy the inevitable discovery exception to the Fourth Amendment exclusionary rule, the government must show that the illegally seized evidence more likely than not inevitably would have been discovered lawfully); *United States v. Matlock*, 415 U.S. 164, 177 n.14 (1974) (voluntariness of a consent to search must be shown by a preponderance of the evidence).

430. *Bourjaily v. United States*, 483 U.S. 171, 175 (1987).

431. *Id.* at 176. A prosecutor must satisfy the requirements of the co-conspirator exception to the hearsay definition by a preponderance of the evidence, rather than a higher standard such as clear and convincing evidence. *Id.* There are five requirements: (1) a conspiracy existed; (2) the declarant was a member of the conspiracy; (3) the non-declarant defendant against whom the statement is being offered was a member; (4) the statement was made during the conspiracy, not before or after it; and (5) the statement was made in furtherance of the conspiracy. *Id.*

of witness credibility.⁴³² Oregon,⁴³³ Idaho,⁴³⁴ Iowa,⁴³⁵ Mississippi,⁴³⁶ and North Carolina⁴³⁷ afford such authority by statute. The language of each provision closely models that of the former FRE 412(c) enacted in 1978.⁴³⁸ That language was deleted from FRE 412(c) when the federal rule was amended in 1994. The Advisory Committee Note to the amendment explains:

On its face, this language would appear to authorize a trial judge to exclude evidence of past sexual conduct between an alleged victim and an accused . . . based upon the judge's belief that such past acts did not occur. Such an authorization raises questions of invasion of the right to a jury trial under the Sixth . . . Amendment[].⁴³⁹

432. *See supra* notes 47-57 and accompanying text. Some statutes authorize or direct the judge to admit evidence of the complainant's prior sexual behavior if it is "relevant" for a legitimate purpose beyond the forbidden "yes/no inference," while others authorize admission only if the special relevance of the evidence outweighs the risk of embarrassment, prejudice and the like. *See supra* notes 47-57 and accompanying text. It is arguable that statutes allowing evidence based on its relevance follow the "conditional relevancy" approach, requiring a judge to credit testimony offered by defense witnesses at the rape shield hearing, while statutes in the latter category, because they require more than merely a finding of relevance, authorize the judge to assess witness credibility. *See supra* notes 423-25 and accompanying text. This inventive approach toward statutory interpretation, however, would read into such statutes a meaning the legislature probably never intended because most legislatures probably never considered the question in the first place. Perhaps it is noteworthy that a state statute enacted after the 1978 version of FRE 412 (*see supra* notes 25-26) lacks language giving the judge the authority to assess credibility: assuming the state legislature used FRE 412 as its model, exclusion of such language suggests a legislative rejection of that concept.

433. ORE. R. EVID. 412(3)(b) provides, in pertinent part:

Notwithstanding subsection (2) of Rule 104 . . . of this Act, if the relevancy of the evidence which the accused seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the hearing in chambers or at a subsequent hearing in chambers scheduled for such purpose, shall accept evidence on the issue of whether such condition of fact is fulfilled and shall determine such issue.

Id. (Rule 104(2) is the state equivalent to FRE 104(b), and is substantially identical to the federal provision.) An appellate court has held that a judge's responsibility to find facts under Rule 412(3)(b) "may include determining whether a witness is credible." *State v. Cervantes*, 881 P.2d 151, 153 (Or. Ct. App. 1994); *see also State v. LeClair*, 730 P.2d 609, 616 (Or. Ct. App. 1986) (discussing judicial discretion in limiting testimony where probative value is minimal because the mother is testifying instead of allegedly abused child).

434. IDAHO R. EVID. 412(c)(2) (substantially identical to the Oregon provision).

435. IOWA R. EVID. 412(c)(d) (provides likewise).

436. MISS. R. EVID. 412(c)(2) (provides likewise).

437. N.C. R. EVID. 412(d) (provides likewise).

438. *See supra* note 28 (citing to the text of the 1978 version of Rule 412).

439. FED. R. EVID. 412 Advisory Committee's Note (citing 1 SALTZBURG & MARTIN, FEDERAL RULES OF EVIDENCE MANUAL, 396-97 (5th ed. 1990)). The Note added that the rule already "provided adequate protection for all persons claiming to be the victims of sexual misconduct, and that it was inadvisable to continue to include a provision in the rule that has been confusing and that raises substantial constitutional issues." *Id.*

C. Case Law

The issue has been directly addressed in relatively few cases. In most of these cases, the defendant seeks to offer evidence of prior consensual sex between himself and the complainant to support his consent defense, while the complainant denies a prior consensual sexual relationship. In such cases, the consensus is that the court must assume the defendant's version of the prior relationship is true,⁴⁴⁰ except in cases where the complainant's injuries preclude any real issue of consent.⁴⁴¹ If, assuming the defendant's testimony is true, the evidence would have sufficient probative value⁴⁴² to survive a challenge on grounds of unfair prejudice, harassment, confusion, and the like,⁴⁴³ the court should permit the defendant to cross-examine the complainant about their supposed prior relationship.⁴⁴⁴ If the complainant denies any such encounters, however, the judge may limit the extent of the cross-examination.⁴⁴⁵ During the defendant's case-in-chief, the defendant may testify as to his version of the relationship⁴⁴⁶ and may offer other probative evidence about it,⁴⁴⁷ subject

440. See *infra* notes 442-49 (discussing admissibility of consent evidence). *Contra* Turly v. Alaska, 356 So. 2d 1238, 1244 (Alaska Ct. App. 1978) (analogizing to "confession" jurisprudence, and ruling that if the trial court disbelieves defendant's *in camera* hearing testimony that he and the complainant had prior consensual sexual relations, it could properly exclude such testimony at trial).

441. See *supra* notes 145-47 and accompanying text.

442. See *supra* notes 125-27 and accompanying text.

443. See *supra* notes 47-57 and accompanying text.

444. *State v. Reiter*, 672 P.2d 56 (Or. Ct. App. 1983) (defense counsel should have been allowed to cross-examine complainant's direct testimony that prior to the alleged rape she knew defendant only as a friend, particularly where, at the rape shield hearing, she admitted consenting to sex with defendant in his car a few days prior to the alleged rape, which also allegedly took place in his car); *State v. Gonyaw*, 507 A.2d 944 (Vt. 1985) (discussed *supra* notes 132-34 and accompanying text).

445. *People v. Tortorice*, 531 N.Y.S.2d 414, 416-17 (N.Y. App. Div. 1988). Defendant may question the complainant in regards to the alleged prior sexual act, but would be bound by her response; if she denied any prior act, the inquiry would be required to end. *Id.*

446. *Wood v. State*, 736 P.2d 363, 366 (Alaska Ct. App. 1987); *Tortorice*, 531 N.Y.S.2d at 416 (although the defendant's testimony as to prior consensual sex was "self-serving, wholly uncorroborated and contradicted by the complainant," because the issue was consent, he would be permitted to testify as to prior acts and would be permitted to enter into evidence a hospital emergency room record which alluded to a prior act of intercourse); *Reiter*, 672 P.2d at 58 (defense counsel should have been allowed to impeach complainant's direct testimony that she knew defendant only as a friend); *Commonwealth v. Baronner*, 471 A.2d 104, 106 (Pa. Super. Ct. 1984) (reversible error to preclude defendant's testimony merely because the trial judge disbelieved him); *Gonyaw*, 507 A.2d at 947 (discussed *supra* notes 132-34 and accompanying text).

447. See, e.g., *Commonwealth v. Fionda*, 599 N.E.2d 635, 636-39 (Mass. Ct. App. 1992) (the judge properly allowed all four witnesses to a prior encounter between the complainant and the defendant to relate conflicting versions of what had happened between them, upon instruction to the jury that if it concluded (as complainant claimed) that she had been

again to the judge's discretion to assess legitimate probative value against its counter-considerations.⁴⁴⁸ A defendant's inability to recall the precise dates and times of the prior conduct does not justify its exclusion.⁴⁴⁹

The issue has also received direct judicial attention in cases in which a defendant sought to show that the complainant previously had brought a false rape charge against another. One court held that it is enough to produce evidence at a pre-trial hearing from which "a reasonable person could reasonably infer that the complainant made prior untruthful allegations of sexual assault",⁴⁵⁰ another court, apparently taking the opposite view, held that to show the man accused in the other incident denied the charges was not a sufficient offer of proof.⁴⁵¹

In other factual settings, direct discussion of the issue is rare,⁴⁵² although it is common for an appellate court to mention or even stress factors that support the credibility of a complainant or defendant.⁴⁵³ Thus, although an imaginative reader may infer that the trial or appellate

too drunk by the end of the prior occasion to know what defendant was doing, it should disregard the incident as not indicative of consent). Similarly, *see Tortorice*, 531 N.Y.S.2d at 415-17.

448. *See supra* notes 122, 135, 293 and accompanying text (*Wood*, etc.) (re: similarity of facts).

449. *Commonwealth v. Grieco*, 436 N.E.2d 167, 171 (Mass. 1982).

450. *State v. DeSantis*, 456 N.W.2d 600, 607 (Wis. 1990).

451. *Hughes v. Raines*, 641 F.2d 790, 792 (9th Cir. 1981).

452. *See State v. Cervantes*, 881 P.2d 151, 152-53 (Or. Ct. App. 1994). Two twelve-year-old girls met the defendant and a friend at a motel and allegedly had sex. *Id.* at 152. At trial, the State offered evidence that semen less than 14 hours old was found in the complainant's cervix shortly after the rape. *Id.* Defendant sought to elicit testimony from the complainant's friend that she had seen the complainant "hanging all over" another man shortly before the alleged rape, and that the complainant had admitted to the friend that she had had sex with that man. *Id.* At the *in camera* hearing, the complainant denied having sex with any man other than the defendant within twenty-four hours of her rape examination. *Id.* The trial court held that, because the defendant failed to prove that the complainant had engaged in sex with the other man, the friend's testimony was inadmissible. *Id.* In essence, the trial court credited the complainant's testimony over that of her friend. *See id.* The Oregon appellate court held there was no error, as Oregon's evidentiary rules authorize judicial assessment of credibility in determining admissibility. *Cervantes*, *supra* at 153. Because the defendant failed at trial to raise a Sixth Amendment objection to exclusion of the evidence, the appellate court refused to consider the constitutional question on appeal. *Id.* at 153 n.3.

453. *See, e.g., United States v. Azure*, 845 F.2d 1503, 1505 (8th Cir. 1988) (discussed *supra* part II.B.); *Wright v. State*, 513 A.2d 1310, 1314-15 (Del. 1986) (discussed *supra* part IV.A.3.); *State v. Bevins*, 439 A.2d 271, 272-73 (Vt. 1981) (discussed *supra* part IV.A.4.); *Commonwealth v. Reed*, 644 A.2d 1223, 1230-31 (Pa. Super. Ct. 1994) (discussed *supra* part IV.A.4.); *Stephens v. Miller*, 13 F.3d 998, 1002-03 (7th Cir.), *cert. denied*, 115 S. Ct. 57 (1994) (discussed *supra* part IV.A.4.); *State v. Morrison*, 351 S.E.2d 810, 814-15 (N.C. Ct. App. 1987) (discussed *supra* part IV.B.); *State v. Colbath*, 540 A.2d 1212, 1217 (N.H. 1988) (discussed *supra* part VI.D.); *Demers v. State*, 547 A.2d 28, 35-36 (Conn. 1988) (discussed *supra* part VII.B.).

court was influenced by an assessment of credibility, there is no way to tell directly.

D. Evaluation

Giving a judge explicit authority to assess witness credibility furthers the goals of rape shield legislation because this authority strengthens the judge's ability to protect the complainant from humiliation and embarrassment, and the State from possible prejudice, which would result from the public airing of false accusations. Arguably, this would merely make explicit in one narrow context what is implicit throughout the trial of a criminal case, i.e., the power and perhaps also the right, of a judge to consider his or her assessment of the defendant's guilt or innocence in ruling on the broad range of issues delegated to the trial court's discretion.⁴⁵⁴ Yet the requirement that a defendant must persuade the judge of a fact by a preponderance of the evidence before he can use that fact to attempt to create a reasonable doubt in the jury's mind as to his guilt creates uneasy implications, with regard to both the jury's role as ultimate arbiter of the facts and the prosecutor's burden of establishing guilt beyond a reasonable doubt.

CONCLUSION

Restricting admissibility of a rape complainant's prior sexual conduct is a salutary development in the law. Despite the wide variations in the nation's forty-nine separate rape shield laws, there is a unanimous consensus that such evidence may not be used as a general reflection on the complainant's credibility,⁴⁵⁵ nor to suggest that because she consented to have sex with other men on other occasions she therefore consented to do so with the defendant on the occasion in question.⁴⁵⁶ A consensus is also emerging, however, that when such evidence may have sufficient special relevance, aside from these forbidden purposes, to exclude it would unduly deprive a defendant the right to confront his accuser and present a defense.⁴⁵⁷ Statutory and judicial disagreement exists, however, as to whether a court may assess witness credibility in ruling on such evi-

454. Indeed, judicial assessment of credibility is the only plausible explanation for some results, such as that in *Cervantes*. See *supra* note 452. Surely testimony by the complainant's friend that the complainant was "all over another man," coupled with the friend's testimony that the complainant stated that she had sex with him, suffices to permit a rational fact-finder to conclude that the semen found in the complainant's cervix was the other man's, not the defendant's.

455. See *supra* part I.A.

456. See *supra* part I.A.

457. See *supra* parts II.-VIII.

dence.⁴⁵⁸ There is also disagreement about the precise nature of the counterweights against which the relevance of such evidence should be measured,⁴⁵⁹ and whether the presumption should be in favor or against admissibility of evidence falling into a category of special relevance.⁴⁶⁰ While uniformity on such matters is not possible, and probably not desirable, a sharper focus on such matters may make it somewhat easier for courts to reconcile the harshly conflicting interests in this area of the law.

458. *See supra* part IX.

459. *See supra* part I.B.3.

460. *See supra* part I.B.3.